(1)

AMER
RECORDS
AND
BRIEFS

2007

Docket No. _____

In The Supreme Court of The United States

MR. BIRGER H. UNDSETH,

Petitioner,

v.

MS. JEANIE LIA UNDSETH,
[a.k.a. Jeanie Doe, Jeanie Dalle Molle,
Jeanie Collins, Jeanie Smith,]
MS. DONNA SIMS,
MS. BARBARA MOON,
THE STATE OF GEORGIA,
THE UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner initiated a federal case averring destruction to constitutional protections afforded *inter alia*, marriage, parental rights, procreation, religious exercise, property and bodily integrity, resulting from his ex-wife's alleged illicit use of a family violence Temporary Protective Order [TPO] as marital separation, as illicitly used to procure malicious divorce, child custody and other destructions. The lower court granted non-prisoner *In Forma Pauperis* [IFP] status, but then, invoking 28 U.S.C. § 1915(e)(2)'s "at any time" provision, dismissed the case before service on defendants, asserting failure to state a claim pursuant to § 1915 (e)(2)(B)(ii), asserting application of the *Rooker-Feldman* doctrine and want of joinable parties. Both the district court and the Eleventh Circuit denied IFP status on appeal. Two business days after filing his appellate brief, the Eleventh Circuit dismissed Petitioner's appeal as frivolous, also invoking 11th Circuit Rule 42–4's "at any time" provision. Thus Petitioner was precluded from ever presenting the law of the case. Thus these questions are presented for review:

1. Whether dismissal of Petitioner's appeal was arbitrary and capricious, or sanctioned arbitrary and capricious dismissal of a justiciable federal case, calling for exercise of this Court's supervisory powers.

2. Whether the nature and effect of TPO proceedings are too prospective or hypothetical to qualify them as judicial proceedings, barring application of *Rooker-Feldman* and authorizing joinder of state court judges.

3. Whether the TPO's deprivation of physical liberty by intrastate banishment warrants appointed counsel pursuant to relevant decisions of this Court, barring application of *Rooker-Feldman*.

(cont.)

4. Whether the TPO is a prejudgment attachment of the rights at issue, making TPO plaintiffs and their attorneys state actors, authorizing joinder thereof, pursuant to relevant decisions of this Court.

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CITATIONS OF REPORTS

No opinions or orders from the courts below have been entered in any official or unofficial reporter.

JURISDICTION

The judgment sought to be reviewed is an 11th Circuit Rule 42–4 frivolousness dismissal (Apr. 3 2007). Jurisdiction rests upon 28 U.S.C. § 1254(1). 28 U.S.C. § 2403(b) may apply and the Attorney General of the State of Georgia has been served. No court below has certified Georgia's Attorney General. *See* R1-2-9-10; R2-8:memo.-3-5, 6. Because the United States has been named as party, Petitioner has made service upon the Solicitor General of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

11th CIRCUIT RULE 42–4: "If it shall appear to the court *at any time* that an appeal is frivolous and entirely without merit, the appeal may be dismissed."
(emphasis added).

28 U.S.C. § 1915 provides, in pertinent part:

(a)(1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

(e)(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the

case *at any time* if the court determines that -

(A) the allegation of poverty is untrue; or

(B) the action or appeal -

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted;

or

(iii) seeks monetary relief against a defendant who is immune from such relief.

(emphasis added).

Pursuant to Rule 14.1(f), the following statutes involved in the case are set out in the appendix:

42 U.S.C. 1983
42 U.S.C. 1985
FEDERAL RULE OF CIVIL PROCEDURE 60(b)
GA. CODE ANN. [hereinafter O.C.G.A.] § 19-13-1
O.C.G.A. § 19-13-3
O.C.G.A. § 19-13-4

STATEMENT OF THE CASE

The facts material to consideration are clear-cut: however, they should not belie the magnitude of the questions presented, which warrant this Court's certiorari review, especially because the underlying destructions are to the most basic human natural rights, even those "fundamental to the very existence and survival of the race," *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942), and to the right to protect them in federal court.

Petitioner initiated a federal case with complaint and motions in the Northern District of Georgia, Atlanta Division [hereinafter NDGa], on August 18, 2006, averring destruction to constitutional protections afforded *inter alia*, marriage, parental rights, procreation, religious exercise, property and bodily integrity, resulting from his ex-wife's

alleged illicit use of a family violence Temporary Protective Order [TPO] as marital separation, allegedly used to illicitly procure authorization for malicious divorce, child custody and other related destructions. R1-2-1-167. Petitioner averred that Respondent Jeanie Undseth could be classified as a state actor by every Supreme Court test. *E.g.* R1-2-1-44-45. Petitioner prayed almost exclusively for declaratory relief. R1-2-1-167-216. Non-prisoner *In Forma Pauperis* [IFP] status was granted by NDGa magistrate on August 28, 2006. R3-34-1. Service did not issue but, instead, the case was immediately put before the district court for 28 U.S.C. § 1915(e)(2) evaluation. R3-34-1-2. On September 11, 2006, Petitioner's case was dismissed before service upon defendants, citing § 1915(e)(2)(B)(ii), failure to state a claim, R3-38-1-27, consequently precluding Petitioner's presentation of the law of the case. Petitioner herein advises the Court that Petitioner made known that he understood the law of the case to be complex, requiring capacious argument. R1-4:memo.-4-5 (For the purposes of this petition, however, Petitioner presents that law which he believes most readily exposes the arbitrary and capricious nature of the Eleventh Circuit's dismissal of Petitioner's appeal). The district court rested its dismissal on (1) application of the *Rooker-Feldman* doctrine and (2) inability of the parties, and their agents, to be joined: the district court barred Respondent Jeanie Undseth's and her attorneys' joinder asserting they could not be as classified state actors. R3-38-17-27; R4-44-3-4. As set forth *infra*, these two conditions did not apply to Petitioner's case, and, ultimately, show the Eleventh Circuit arbitrarily and capriciously dismissed Petitioner's appeal.

Petitioner filed a Federal Rule of Civil Procedure [FRCP] 59(e) motion on September 26, 2006, 11 business days after judgment, causing the district court to construe the 59(e) motion as a FRCP 60(b) motion, which was denied on October 6, 2006. R4-44-1-2, 5. Petitioner filed Notice of Appeal October 12, 2006, causing the Eleventh Circuit to grant permission to appeal the 60(b) motion for abuse of

discretion, but dismissing the rest of the appeal as untimely, on November 6, 2006. R4-50:or.-1-2.

IFP status for appeal was denied by the district court on November 30, 2006, citing bad faith. R4-51-3. IFP status for appeal was denied by Appellate Justice Charles Wilson on February 7, 2007, citing frivolousness. R4-56:or.-1. Petitioner, a food stamp recipient[1], paid $455.00 in fees to proceed with the appeal. R4-57:or.-all. However, on April 3, 2007, two business days after Petitioner's appellate brief was filed, the appeal was dismissed *sua sponte* as frivolous without opinion, citing 11th Circuit Rule 42–4, which, similar to § 1915(e)(2), empowers the Eleventh Circuit to dismiss any frivolous *and* meritless appeal "at any time," *pro se* or non-*pro-se*. Doc. 62. Motion to reconsider dismissal of appeal was denied, also without opinion, on May 16, 2007. Or., 06-15479-BB (May 16 2007).

Thus, the basis of jurisdiction of the court of first instance is in question and is, in fact, the ultimate issue underlying Petitioner's request for the Court's certiorari review of the Eleventh Circuit's frivolousness dismissal. However, the issue is no bar to the exercise of this Court's certiorari jurisdiction. Contrary to the district court's ruling, Petitioner asserts *Rooker-Feldman* did not apply to his case, and that parties were joinable, *especially* Respondent Jeanie Undseth as state actor (though the sovereign parties' participation would have required sovereign immunity waiver. *E.g.* R1-2-7-12). If Petitioner is correct, Petitioner was entitled to proceed with the case as a matter of right, and has already been irreparably and peculiarly injured by delay of justice. *U.S. v. Real Prop. Located at Incline Village*, 976 F. Supp. 1327, 1358-59 (D. Nev. 1997) (recognizing federal district courts shall provide a remedy for every right, and shall do so "fully without any denial, and speedily without delay." (quotations omitted)). Moreover, if Petitioner is correct Petitioner's injuries are especially egregious because parental

[1] App.'s Mot. IFP, Ex. D 1, 4 (11th Cir., Dec. 15 2006); R2-8:memo.-2-3.

rights are perishable and expire, thus the district court's delay will have forever barred Petitioner's actual justice and remedy even if this Court now finds in his favor. *See* R1-4:memo.-1-2. However, even if parental rights weren't perishable, the circumstances described in this instant *Statement of the Case* is no bar to this Court's exercise of certiorari jurisdiction, because "[t]he Court's supervisory power over federal courts allows the Court to intervene to protect the integrity of the federal system." *Frazier v. Heebe*, 482 U.S. 641, 647 n. 7 (1987); *accord Chapman v. Goodnow's Adminstr.*, 123 U.S. 540, 548 (1887) (recognizing:

> [i]f a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right . . . as if it has been specifically referred to and the right directly refused).

REASONS FOR GRANTING THE PETITION

Rights mean nothing in a nation which offers no opportunity to protect them. *See Boddie v. Conn.*, 401 U.S. 371, 375 (1971). Thus, the magnitude of the Eleventh Circuit's frivolousness dismissal inheres in the importance of the rights which were ultimately destroyed, why Petitioner was denied the opportunity to defend them, and who the dismissal effects. As now set forth, denial of Petitioner's rights by frivolousness dismissal was extraordinarily peculiar and egregious, effecting not only *pro se* litigants, not only IFP litigants, but every civil litigant who can be similarly injured, including, but not limited to, TPO defendants. But even if these destructions effected the Petitioner alone, this Court's certiorari review would still be warranted. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 851 (1992) ("Beliefs about these matters [marriage, family relationships, child rearing and procreation as central to personal individual

liberty] could not define the attributes of personhood were they formed under compulsion of the State").

I. The Frivolousness Standard

The frivolousness standard authorizes *sua sponte* dismissal " 'only if the [Petitioner] cannot make any rational argument in law or fact which would entitle him or her to relief.' " *Neitzke v. Williams*, 490 U.S. 319, 322-23, 328-29 (1989). If an appeal is even doubtfully argued the appeal must be allowed to proceed. *Id.* at 323, 329. Thus, if Petitioner can conclusively show that the district court abused its discretion in dismissing Petitioner's case for failure to state a claim then dismissal of Petitioner's appeal is far beyond reproach for a finding of frivolousness. Moreover, the Eleventh Circuit recognizes it is binding upon the federal appellate *and* district courts to correct their own mistakes, even *sua sponte*. *McDowell v. Celebrezze*, 310 F.2d 43, 44 (5th Cir. 1962). Thus, any mistake the Eleventh Circuit made in dismissing the appeal for frivolousness requires reversal. Thus failure to do so makes the dismissal solely an act of the Eleventh Circuit's will and discrimination, unbridled by and without any authority or reason, thus nothing other than arbitrary and capricious. *U.S. v. Carmack*, 329 U.S. 230, 243 & n. 14, 247 & n. 18 (1946).

II. The Abuse Of Discretion Standard

This Court recognizes that "[a] district court by definition abuses its discretion when it makes an error of law." *Koon v. U.S.*, 518 U.S. 81, 100 (1996) (citation omitted). Abuse of discretion by error of law requires reversal. *Id.*; *McDowell*, 310 F.2d at 44. As noted, the district court's threshold for enforcement of § 1915(e)(2)(B)(ii) dismissal was (1) application of the *Rooker-Feldman* doctrine and (2) inability of the parties to be joined to Petitioner's case. R3-38-17-27; R4-44-3-4. As noted, the district court ruled Respondent

Jeanie Undseth could not be joined as a state actor. R3-38-21-22. As will be shown, these findings are at variance with several key decisions of this Court. Regardless, if Petitioner can at least rationally argue the district court made an error of law on both points the Eleventh Circuit's frivolousness dismissal mandated reversal, and thus was, moreover, arbitrary and capricious.

Additionally,

> where the subordinate court [i.e., any state court in this action] was without jurisdiction and has given judgment or decree . . . the judgment or decree in the court below *must* be reversed, else the party which prevailed there would have the benefit of such judgment or decree, though rendered by a court which had no authority to hear and determine the matter in controversy.

Mansfield Coldwater & Lake Mich. Ry. Co. v. Swan, 111 U.S. 379, 385 (1884) (quotations omitted, emphasis added). Thus, if *Rooker-Feldman* does not apply to Petitioner's case and Respondent Jeanie Undseth or others were joinable, *Mansfield* additionally confirms it was the district court's duty to *take* Petitioner's case.

As the record shows, the district court affirms that "[a] complaint may be dismissed for failure to state a claim [only] when it appears *beyond doubt* that the plaintiff can prove NO set of facts in support of his claim which would entitle him to relief." R3-38-2 (emphasis, capitalization added). Thus, *expressio unius est exclusio alterius*, the district court was uncontrovertibly barred from dismissing Petitioner's case for failure to state a claim unless an assessment of the *entirety* of the law *affirmatively* and *definitively* excluded EVERY claim that ANY set of facts in the complaint might prove. Indeed, "[t]rial courts are cautioned to search the complaint 'in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned *even from an obscure statement of claim*.' " *Banco Popular N. Am. v. Gandi*, 876 A.2d 253, 255 (N.J. 2005) (emphasis added). Thus, the abuse of discretion standard must be applied to the mandatory

examination of the entirety of the law required of a district court when it dismisses a case for failure to state a claim.

III. Nature Of Petitioner's Injuries

Petitioner's injuries began with issuance of a family violence TPO against him by Respondent Jeanie Undseth, as did the Undseth's divorce, child visitation modification, and other progeny proceedings. R1-2-1-166 & apps. A & B; R3-38-5-15; Doc. 63:memo. The TPO was the marital separation between the Undseths. *E.g.* R3-41:memo.-21. The subsequent divorce was based on cruelty and no-fault grounds. *E.g.* R3-41:memo.-21, ex. F, ¶ 7. Marital separation is the total loss of every conjugal right–i.e., consortium–including but not limited to sexual intercourse. *See Hosford v. Hosford*, 58 Ga. App. 188, 198 S.E. 289, 291 (1938) (identifying marital separation in alienation of affections). No authority for divorce or related proceedings exists in absence of a *bona fide* marital separation. O.C.G.A. § 19-6-1(a) (alimony incident to separation); *Southworth v. Southworth*, 265 Ga. 671, 461 S.E.2d 215, 217 (1995) (recognizing cohabitation after separation is a defense against no-fault divorce); *Veal v. Veal*, 226 Ga. 285, 174 S.E.2d 435, 437 (1970) ("Child support is part of alimony"); *Sutton v. Sutton*, 224 Ga. 140, 160 S.E.2d 385, 386 (1968) (divorce based on cruelty grounds "presupposes a bona fide separation"); *Brinson v. Jenkins*, 207 Ga. 218, 60 S.E.2d 440, 441 (1950) (power for judge to award permanent or temporary child custody is incident only to a divorce proceeding). Additionally, a TPO marital separation effectively automatically permanently deprives parental/custody rights as a matter of law. O.C.G.A. § 19-9-7(a) & (b) (initially barring *visitation* upon family violence finding); *see* O.C.G.A. § 19-9-1(a)(1) & (2). Additionally, a TPO is codified as a arrest. R1-2-38; R3-41:memo.-13-14; 1981 Ga. Laws 880 (codifying Georgia's Family Violence Act [i.e., TPOs] as an amendment to § 27-207 criminal arrest without warrant); *accord* O.C.G.A. § 17-

4-1.

A marital separation cannot violate the federal Constitution. *See Bingham v. Miller*, 17 Ohio 445, 446-449 (1848) (finding legislative divorces unconstitutional for want of federal constitutional authority); *Griffin v. Ill.*, 351 U.S. 12, 26 (1956) (Frankfurter, J., concurring) (lauding the *Bingham* court for finding "no difficulty" in declaring legislative divorces unconstitutional).

Consequently, if *Rooker-Feldman* does not apply and if Respondent Jeanie Undseth is a state actor, Supreme Court and other substantive law mandates that any illicit use of the TPO to effectuate Petitioner's injuries, including to procure authorization to commence progeny proceedings, cannot be allowed to succeed. *Lawrence v. Tex.*, 539 U.S. 558, 577-79 (2003) (recognizing absent a legitimate state interest the state may not intrude "into the personal and private life of the individual"); *Casey*, 505 U.S. at 895-96, 897 (recognizing, "[w]ith regard to the children he has fathered and raised," "it would be reasonable to conclude as a general matter that the father's interest in the welfare of the child and the mother's interest are equal," and also recognizing that forced termination of such rights by statutory or other spousal veto is unconstitutional); *Michael H. v. Gerald D.*, 491 U.S. 110, 113-32 (1989) (established paternal rights protected against illegitimacy claim); *Lehr v. Robertson*, 463 U.S. 248, 265-67 (1983) (equal protection bars granting only mother veto power over adoption proceeding but not similarly situated father); *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978) (when recognizing abortion and a woman's right to conceive and bear an illegitimate child against the foundational importance of the "fundamental liberty" of marriage and its concomitant right "to . . . bring up children" thereinto, the Court determined that "[s]urely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection." (citations, quotations omitted)); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (It is the "*individual*, [whether] married or single," whose

reproductive decisions are protected against "unwarranted governmental intrusion"); *Loving v. Va.*, 388 U.S. 1 (1967) (right to remain married found federally protected against unconstitutional antimiscegenation statutes); *Holt v. Leiter*, 232 Ga. App. 376, 501 S.E.2d 879, 880-84 (1998) (reversing custody decree where a custodial parent had negatively affected the child's welfare by absconding with the child and hiding in another state, "obstinate[ly] prevent[ing] . . . visitation" with the non-custodial parent, and poisoning the child's relationship with the non-custodial parent). Additionally, substantive Georgia law *expressly* recognizes marriage to be a reproductive right. *Lefkoff v. Sicro*, 189 Ga. 554, 6 S.E.2d 687, 692 (1939) ("[m]arriage . . . is . . . for the . . . multiplication . . . of the species") (citation omitted). Additionally, when considering that after birth the father's right to the child is equal to the mother's, as per *Casey* (and *Lehr*), and that marriage is a reproductive right, as per *Lefkoff* (and *Zablocki*), if a TPO is illicitly used to acquire a child and/or concomitant parental/custody rights, and/or end marriage, the injury must be considered the substantial equivalent of forced abortion.

IV. Two Reasons Why *Rooker-Feldman* Does Not Apply To Petitioner's Case

The *Rooker-Feldman* doctrine preserves this Court's appellate jurisdiction over state-court judgments by barring review of finalized state-court judgments in the district courts. *Exxon Mobil Corp. v. Saudi Basic Induss.*, 544 U.S. 280, 283-93 (2005). *Rooker-Feldman* accomplishes this by barring "what in substance would be appellate review of the state judgment in a United States district court." *Exxon*, *id.* at 287 (quotations omitted).

However, when applying *Rooker-Feldman* it is "crucial" that the challenged state-court proceeding be judicial. *D.C. Ct. of Apps. v. Feldman*, 460 U.S. 462, 476 (1983). Judicial proceedings require, *inter alia*, "an actual controversy over

an issue" and a "judicial inquiry [which] investigates, declares, and enforces liabilities as they stand on present or past facts." *Feldman*, *id.* at 477, 478, 479 (quotations omitted). Judicial proceedings do not litigate for "rights which may arise in the future." *Feldman*, *id.* at 478 (quotations omitted). The "making of a rule for the future" is a legislative act and not judicial. *Feldman*, *id.* at 477 (quotations omitted). "The form of the proceeding is not significant. It is the nature and effect which is controlling." *Feldman*, *id.* at 478 (quotations omitted). And, unless declaratory relief is sought, legitimate lawsuits secure actual relief, not hypothetical relief. *Hewitt v. Helms*, 482 U.S. 755, 759-64 (1987).

O.C.G.A. § 19-13-3(b) effectuates a TPO upon "a verified petition in which the petitioner alleges with specific facts that probable cause exists to establish that family violence has occurred in the past and [family violence] *may* occur in the future." Further, O.C.G.A. § 19-13-4 purports TPOs are "protective orders." And § 19-13-3(c) purports TPOs are civil proceedings. Thus, it is clear that the word "*may*" as used in O.C.G.A. § 19-13-3(b) means "possibility." *Black's Law Dictionary* 1000 (Bryan A. Garner ed., 8th ed., West 2004); *see* O.C.G.A. § 1-3-3(10). Thus it is clear a TPO is executed upon the standard that the danger, if it actually did exist, is over and no actual immediate or pending danger exists. In fact, in the non-*ex-parte* post-deprivation hearing the petitioner only has to "prove the allegations of the petition," O.C.G.A. § 19-13-3(c), which are those codified in O.C.G.A. § 19-13-3(b), which, reiterating, only go to establish that "probable cause exists to establish that family violence has occurred in the past and *may* occur in the future." Neither the statute nor its language require an actual investigation of any underlying transaction *per se*. And the word "*may*" clearly indicates that the statute does not require showing of certain immediate or future danger, either *ex parte* or post-*ex-parte*. Indeed, the word "*may*" clearly authorizes that the defendant be deprived upon a threshold where future family violence is

not likely, but only a possibility. *Ergo*, when considering the TPO's standard for deprivation, the effect of a TPO proceeding is that it makes a legislative rule for the future between two parties: no actual legal liability exists, *ergo* no judicial investigation of actual legal liabilities occurs, either *ex parte* or post-*ex-parte*, nor is there an actual controversy. It's a hypothetical charge: the wrong "*may* occur in the future"; the wrong does not actually exist, nor is it pending, nor is it at all certain, or even likely. Moreover, the TPO does not offer actual relief: it offers hypothetical relief: it is relief from what *may* happen, not from what actually happened, from what is actually going to happen, or even from what is actually likely to happen. Thus the nature and effect of a TPO is that it effectuates a rule for the future which makes the TPO a legislative proceeding, and neither does it address nor investigate any actual legal liabilities, nor address any actual controversy, nor offer any actual relief, and because of any or all of these, a TPO proceeding cannot be considered an actual judicial proceeding. It simply does not perform the functions of a judicial proceeding. Thus, even without going further, *Rooker-Feldman* does not apply to the instant case. And if O.C.G.A. § 19-13-3(b) should be construed to mean "probable cause exists to establish that family violence has occurred in the past and [probable cause exists to establish family violence] *may* occur in the future," an appreciably more lax standard, then *Rooker-Feldman* is especially inapplicable.

Further, the legal term "Protective Order" indicates Georgia purports family violence TPOs are peace-warrant proceedings. 11 C.J.S. *Breach of the Peace* § 25 (1995). However, peace-warrant proceedings require "a probable suspicion that some crime is intended, or is likely to happen," or justified belief thereof. *Id.* at § 15; O.C.G.A. §§ 17-6-90(a), 17-6-110(a). Peace-warrant proceedings "are measures intended to prevent future acts of violence rather than to punish past acts." 11 C.J.S. *Breach of the Peace* § 14. "The word 'likely' means 'probable,' not merely possible."

Lumbermens Mut. Cas. Co. v. Plantation Pipeline Co., 214 Ga. App. 23, 447 S.E.2d 89, 91 (1994). Thus, because "*may*" means "possibility" and not "probability," a family violence TPO proceeding cannot be a peace-warrant proceeding. Thus it cannot be considered a judicial proceeding, and certainly not a civil proceeding. *Accord* 1981 Ga. Laws 881, § 3(b) (originally codifying O.C.G.A. § 19-13-3(b) to require a TPO plaintiff to "allege[] a substantial likelihood of immediate danger of family violence"); *Foster v. Withrow*, 201 Ga. 260, 39 S.E.2d 466, 469 (1946) ("[Georgian] courts have generally considered peace-warrant proceedings as being in the nature of criminal proceedings"). Thus *Rooker-Feldman* additionally cannot be applied to family violence TPO proceedings. Further, as family violence TPOs issue upon the possibility of harm and not the probability of harm, then, by definition, they issue upon an *unlikeliness* of harm, as indicated by *Lumbermens*. Thus, family violence TPOs issue upon a threshold of *unjustified* belief of harm—not justified belief of harm—additionally barring application of *Rooker-Feldman*.

Further, family violence transactions are codified as "any felony" and specific misdemeanors, all punishable by imprisonment. O.C.G.A. §§ 16-1-3(5), 17-10-3(a)(1), 19-13-1. Because O.C.G.A. § 19-13-3(b) requires allegations of "specific facts that probable cause exists to establish that family violence has occurred in the past," the statute manifestly seeks any such past act for its reputed probable cause inquiry, thus precluding any time-limit to allege or adjudicate them. Thus, O.C.G.A. § 19-13-3(b) & (c) keeps stale TPO accusations alive indefinitely. But real and true probable cause inquiries require, *inter alia*, a test of an accusation's staleness. This Court recognizes "the 'most serious' . . . of the interests of the accused in obtaining a speedy disposition of outstanding criminal charges [is] the interest in ' "limit[ing] the possibilities that long delay will impair [his] ability [] to defend himself." ' " *Carchman v. Nash*, 473 U.S. 716, 732-33 (1985) (1st & 4th brackets added);

accord Suggs v. Hopper, 234 Ga. 242, 215 S.E.2d 246, 247 (1975) ("[t]he purpose of [time-limits for interstate detainers] is to insure speedy trial on pending [criminal] charges before staleness and difficulty of proof set in. These are pre-trial . . . considerations"). Thus probable cause is fatally flawed by staleness, which hinders an accused's ability to defend himself, which thus advances false accusations and erroneous deprivations. Thus, because O.C.G.A. § 19-13-3(b) & (c) is codified to keep stale TPO accusations alive indefinitely, TPOs are codified with an eye to obstruct the defense. Thus the statute destroys the adversarial nature of the proceeding and advances malicious TPO prosecutions and erroneous deprivations. Thus *Rooker-Feldman* additionally did not apply.

Moreover, while the TPO's legislative nature and effect shows TPO proceedings are not judicial proceedings, when combined with O.C.G.A. § 19-13-3's spurious probable cause inquiry the TPO's cumulative standard of deprivation becomes no standard at all: absent a showing of real probable cause and certain pending, or even likely, danger, the TPO defendant is deprived on nothing more than a plaintiff's bald accusations, making the entire code section bogus. Thus lower court reliance on *Rooker-Feldman* was wholly illegitimate.

A second reason exists to bar application of *Rooker-Feldman*. The district court enforced *Rooker-Feldman* asserting Petitioner had a reasonable opportunity to raise his claims in state court. R3-38-26.

However, defendants in proceedings that threaten deprivation of physical liberty have the right to appointed counsel. *Lassiter v. DSS of Durham County*, 452 U.S. 18, 25, 26-27 (1981); *Davis v. Page*, 714 F.2d 512, 515 (5th Cir. Unit B 1983). Deprivation of physical liberty occurs when a person is "detained . . . by [any] means which refrained him from moving from one place to another as he saw fit." *Reicheneder v. Skaggs Drug Ctr.*, 421 F.2d 307, 310 (5th Cir. 1970) (regarding false imprisonment). The TPO is a

detention by conversion, preventing a defendant from moving from one place to another as he sees fit, the most prominent place being near or into his home. Thus TPOs deprive physical liberty. This deprivation of physical liberty is not trivial. The home is recognized to be "the most private of places." *Lawrence*, 539 U.S. at 567. It is where, *Q.E.D.*, we anchor our lives. And where the home is an apartment secured by lease, as in the instant case, a Georgia landlord "fully" parts with all possession of the property and right thereto, and is liable for no tort except for damages arising from "defective construction" or "failure to keep the premises in repair." O.C.G.A. § 44-7-14. Thus the apartment dweller exercises control over the property substantially similar to home ownership. An " 'owner of real property' " is a freeholder. *Quinn v. Millsap*, 491 U.S. 95, 106 n. 9 (1989). And a disseise is " 'nothing more than the intention of the disseisor to appropriate and use the land as his own to the exclusion of all others.' " *Guar. Title & Trust Corp. v. U.S.*, 264 U.S. 200, 204-05 (1924). Thus, even for an apartment secured by lease, the TPO share household eviction is the substantial equivalent of disseise. *See also Engblom v. Carey*, 677 F.2d 957, 958-64 (2d Cir. 1982). Disseise, along with being taken, imprisonment, outlawment, exile and personal destruction, is a deprivation which necessitated, founded and created modern due process. *In re Winship*, 397 U.S. 358, 377-79 (1970) (Black, J., dissenting); *Griffin*, 351 U.S. at 16-17 (majority). Thus, the TPO share household eviction is a severe deprivation of liberty, even for apartment dwellers. Further, the TPO share household eviction is a form of banishment, and thus substantive law additionally recognizes its *physical* harshness is also analogous to imprisonment. Ga. const. art. 1, § 1, ¶ 21; *see Ellis v. State*, 282 Ga. App. 17, 637 S.E.2d 729, 734 (2006) ("determinative factor" in asportation element of kidnapping defined as coercion which "even momentarily caused the victim . . . to engage in actions (including moving from one place to another) against [their] will." (parenthesis in original, punctuation omitted)); *accord*

Yother v. State, 243 Ga. App. 422, 532 S.E.2d 696, 696 (2000) (recognizing statutory revision ultimately affirms *State v. Chandler*, 184 Ga. App. 1, 360 S.E.2d 727, 728 (1987), wherein meaning of " 'lawful custody' " sustaining finding of felony criminal escape was defined as an "environment [where] appellee would not be free to come and go at will. More importantly, he would not be free to go and stay at will"); *State v. Collett*, 232 Ga. 668, 208 S.E.2d 472, 472-74 (1974). Moreover, a person may be disseised from liberties as well as from freehold [i.e., property]. *Winship*, 397 U.S. at 378 (citing *1225 Magna Charta*). The liberty of marriage requires cohabitation. *Drewry v. State*, 208 Ga. 239, 65 S.E.2d 916, 920 (1951) ("fully adopt[ing]" the dissent in *Lefkoff*, *id.*, 6 S.E.2d at 701-704, recognizing the element of "consummation according to law" necessary to establish legal marriage "means [consummation] by cohabitation," *id.* (quotations omitted)). And obviously the right to raise a child in a traditional family setting, as per *Zablocki*, requires cohabitation in the home. Thus, for married people with children, like the Petitioner, the TPO share household eviction is also a disseise from the liberty of marriage, and the right to raise a child in a traditional family setting, both of which are recognized reproductive rights warranting as much federal protection as abortion, as established pages 9-10 *supra*. Thus, for married apartment dwellers, especially those with children, as in the instant case, the TPO disseise is an appreciably more severe deprivation of physical liberty. Regardless, *Lassiter* mandates appointed counsel. *Accord Roberts v. Janco*, 335 F. Supp. 942, 945-47 (N.D.W. Va. 1971).

Petitioner expressly averred the state court violated his right to appointed counsel mandated by *Lassiter*. R1-2-43 (¶ 81). Moreover, Petitioner pled he was not represented for any state court proceedings except for a criminal child abandonment proceeding. *E.g.* R1-2-58, 78, 87, 101, 134, 137-38, 141.

Denial of the right to counsel, whether in a civil or criminal

case, presupposes denial of the reasonable opportunity to raise claims therein. *Powell v. Ala.*, 287 U.S. 45, 68-69 (1932); *accord Argersinger v. Hamlin*, 407 U.S. 25, 30-32 (1972); *Gideon v. Wainright*, 372 U.S. 335 (1963) (both quoting, *inter alia*, *Powell*, 287 U.S. at 68-69). Thus, as Petitioner was not appointed counsel for the TPO, Petitioner was not afforded a reasonable opportunity to raise his claims therein, thus barring application of *Rooker-Feldman*. Moreover, denial of the right to counsel is not just a denial of due process, but a denial of the proceeding itself. *Powell*, 287 U.S. at 69. Thus, because denial of counsel is the denial of a judicial proceeding itself, application of *Rooker-Feldman* to the TPO was additionally barred. Further, "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases." *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). Thus denial of procedural due process by denial of counsel destroys the truthfinding process, *accord Powell*, 287 U.S. at 68-69, which, in turn, destroys the possibility of the proceeding becoming judicial because " '[i]t is precisely the function of a judicial proceeding to determine where the truth lies,' " *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983). Thus application of *Rooker-Feldman* to the TPO was again barred.

As no cause for divorce, child custody or child support exists in absence of a *bona fide* marital separation, pg. 8 *supra*, enforcement of *Rooker-Feldman* against the TPO progeny proceedings was inapposite, null and void. Regardless, if Respondent Jeanie Undseth may be joined to suit as a state actor, the appeal cannot be frivolous.

V. Respondent Jeanie Undseth Was Indeed Joinable

As now set forth, ruling that Respondent Jeanie Undseth was not a state actor patently contravenes this Court's holding in *Lugar v. Edmondson Oil Co.*

TPOs secure the defendant's appearance in court and control over custody of the child, concomitant parental rights,

and marital property *ex parte* until satisfactory judgment for the TPO plaintiff is procured in a no *-ex-parte* post-deprivation hearing. O.C.G.A. §§ 19-9-7(a) & (b), 19-13-3, 19-13-4. This Court recognizes that the purpose of prejudgment attachments is to (1) "secure a respondent's appearance [in court]" and (2) "assure satisfaction in case the suit is successful." *Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684, 693 (1950) (regarding foreign admiralty prejudgment attachments) (citation omitted); *but see Wash. St. DSHS v. Guardianship Est. of Keffeler*, 537 U.S. 371, 382-83 (2003); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924-25 (1982) (both remaining silent on issue of secured appearance but recognizing prejudgment attachments exist where seizure assures satisfaction). Thus, as TPOs also secure the respondent's appearance in court and seize children and property *ex parte* to assure satisfaction of a successful judgment for the plaintiff, TPOs must be a prejudgment attachment of marital property and parental/custody rights, or the substantial equivalent thereof.

Additionally, parental rights behave exactly like or substantially similar to property rights. The term "property" means realty or personalty which is "actually owned," "[t]he right of ownership" thereto, and "[t]hat which is subject to being owned *or* enjoyed." O.C.G.A. § 44-1-1 (emphasis added); *U.S. v. Gen. Motors Corp.*, 323 U.S. 373, 377-78 (1945); 63C Am. Jur. 2d *Property* § 1 (1997). Parents have the right to entitlement, possession and legal disposal of the child which is exactly like or substantially similar to how property is titled, possessed and legally disposed of. *E.g.* O.C.G.A. §§ 19-7-1(a) & (b), 19-8-4, 19-8-5, 19-8-6, 19-9-6, 19-10A-4. Children are used for services and proceeds like property. O.C.G.A. § 19-7-1(a). Obviously, children are enjoyed by parents. *Accord Childs v. U.S.*, 923 F. Supp. 1570, 1582-83 (S.D. Ga. 1996); *S. Fulton Med. Ctr., Inc. v. Poe*, 224 Ga. App. 107, 480 S.E.2d 40, 45 (1996) (both recognizing a child's society is compensable in wrongful

death tort). Thus, because parental/custody rights behave exactly like or substantially similar to property rights, another reason exists to show that parental/custody rights can be seized by prejudgment attachment, which O.C.G.A. §§ 19-13-3 and 19-13-4 certainly codify.

This Court has unequivocally held that prejudgment attachment plaintiffs are state actors by joint participation. *Lugar*, 457 U.S. 922 (1982). Specifically, this Court held:

> The [Federal] Court of appeals erred in holding that in this context [of using state officials by *ex parte* application to seize property] "joint participation" required something more than invoking the aid of state officials to take advantage of state-created attachment procedures. . . . Whatever may be true in other contexts, this [i.e., the ordinary use of a prejudgment attachment used as prescribed by procedural scheme] is sufficient [to classify the private party plaintiff as a state actor under the joint participation test] when the State has created a system whereby state officials will attach property on the *ex parte* application of one party to a private dispute.
>
> In summary, petitioner [i.e., Mr. Lugar] was deprived of his property through state action; respondents were [i.e., the original plaintiffs in the prejudgment attachment], therefore, acting under color of state law in participating in that deprivation.

Lugar, 457 U.S. at 942. Thus, per *Lugar*, there is no legal doubt that private persons who secure property or children by prejudgment attachment, or other *ex parte* application, as with a TPO, are state actors. Thus, even without going further, it is clear Respondent Jeanie Undseth was a state actor.

Thus, because *Rooker-Feldman* was barred and Respondent Jeanie Undseth was a state actor by commencing the TPO, the district court abused its discretion in dismissing Petitioner's case. Thus Petitioner's appeal was well beyond a

finding of frivolousness, subsequently barring the Eleventh Circuit's dismissal. Thus, as no authority or reason existed to bar Petitioner's appeal, the Eleventh Circuit's frivolousness dismissal can be nothing other than arbitrary and capricious.

Additionally, as noted, every progeny proceeding of the TPO subsequently lacked cause, pg. 8 *supra*, thus precluding all authority for subsequent deprivations of Petitioner's constitutionally protected fundamental rights. Thus, Petitioner's injuries were patently unconstitutional. Pgs. 9-10 *supra*.

Additionally, the progeny proceedings were the poisonous fruit of the TPO. "[V]erbal evidence . . . derived from an unlawful invasion may be 'no less the "fruit" of official illegality than the more common tangible fruits of the unwarranted intrusion.' " *U.S. v. Terzado-Madruga*, 897 F.2d 1099, 1113 (11th Cir. 1990) (quoting *Wong Sun v. U.S.*, 371 U.S. 471, 485 (1963)). Thus Petitioner's testimony in the TPO and its progeny proceedings was inadmissible unless "purged of the primary taint." *Id.* However, as noted, no cause for divorce or related proceedings exists in absence of a *bona fide* marital separation and TPO marital separations automatically destroy TPO defendants' parental/custody rights. Pg. 8 *supra*. No-fault divorce is granted where "either or both parties are unable or refuse to cohabit and there are no prospects for a reconciliation," the test of which is "subjective." *Whitmire v. Whitmire*, 236 Ga. 153, 223 S.E.2d 135, 136 (1976) (quotations omitted). Subsequently, when TPO plaintiffs swear that reconciliation and cohabitation is impossible, and use the finalized TPO as evidence thereof, divorce and, *ergo*, custody, are authorized as a matter of law. *Dickson v. Dickson*, 238 Ga. 672, 235 S.E.2d 479, 481-83 (1977). Thus, no purge of the primary taint was possible, additionally precluding frivolousness, thus once again showing the Eleventh Circuit's frivolousness dismissal can be nothing other than arbitrary and capricious.

VI. Others Were Also Joinable

As now set forth, the ability of the district court to join Respondents was even effectively admitted by the district court itself. Additionally, agents for Respondent the State of Georgia were also joinable. Thus, as will be shown, the Eleventh Circuit additionally arbitrarily and capriciously sanctioned NDGa abuse of discretion.

As noted pages 7-8 *supra*, the district court was required to assess the entirety of the law for ANY claim that ANY set of facts Petitioner's complaint might prove.

Moreover, well-settled pleading law establishes: "a court must accept the allegations in the complaint as true, construing them in the light most favorable to the plaintiff[]." *Kirby v. Siegelman*, 195 F.3d 1285, 1289 (11th Cir. 1999). "[E]ven where 'it may appear on the face of the pleadings that a recovery is very remote and unlikely' " dismissal for failure to state a claim is still barred. *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 682 (11th Cir. 2001). This is especially true in the instant case because, to prevent abuse and injustice, "*pro se* complaints[] are not [to be] dismissed prematurely, however unlikely the set of facts postulated." *Taylor v. Gibson*, 529 F.2d 709, 713 (5th Cir. 1976). Pleading allegations may be direct or infer relief or cause of action. Moreover, pleadings do not have to state, or even intend, the case's claims. *St. Joseph's Hosp., Inc. v. Hosp. Corp. Of Am.*, 795 F.2d 948, 954 (11th Cir. 1986) (citation omitted); Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* vol. 5, § 1216, 227 (3d ed., West 2004). "A plaintiff is not required to provide at the complaint stage information unavailable to the pleader, especially if in the exclusive possession of the adversary." *U.S. ex rel. Mikes v. Straus*, 853 F. Supp. 115, 119 (S.D.N.Y. 1994) (citations omitted). Facts do not have to be fully developed at the complaint stage. *Evans v. McDonalds Corp.*, 936 F.2d 1087, 1091 (10th Cir. 1991).

Legal theories do not have to be "developed in detail before the complaint is filed and the parties have opportunity for discovery." *Id.* "[M]ere" or "bald" legal conclusions are

improper. However, it is "permissible" and may be "*necessary*" to draw legal conclusions where the alleged facts "tend to support the conclusion." *White v. State*, 253 Ala. 645, 647, 46 So. 2d 413, 414 (1950). "[W]here the facts admit of different conclusions, it is *necessary* that the pleader [allege legal conclusions]." *Poole v. William Penn Fire Ins. Co.*, 264 Ala. 62, 65, 84 So. 2d 333, 336 (1955) (emphasis added, quotations omitted). "Where law and facts are so combined as to render their separation impractical it is proper to allege conclusions of law." *Brogdex Co. v. Food Mach. Corp.*, 29 F. Supp. 698, 699 (D. Del. 1939).

In the FRCP 60(b) motion Petitioner argued that "the private defendants" were "improperly dismissed" "because, *inter alia*, they became state actors when they sought and enforced a [TPO] against [Petitioner]." R4-44-3. Donna Sims and Barbara Moon [hereinafter collectively the other private defendants], are Respondent Jeanie Undseth's attorneys. R3-38-5 & n. 2. Donna Sims represented Respondent Jeanie Undseth for all actions except the child visitation modification proceeding. *E.g.* R1-2-58, 60-61, 78, 87, 101, 134, 137-38, 141.

The argument that the other private defendants were state actors or otherwise could be held liable for 42 U.S.C. § 1983 and § 1985 violations, or other constitutional violations Petitioner averred, is valid. As now set forth, the other private defendants were jointly liable with Respondent Jeanie Undseth, and no less dismissible than she. The "*inter alia*" that district court judge Evans neglected in her FRCP 60(b) denial was the argument that Petitioner averred that the other private defendants were principals with Respondent Jeanie Undseth in "[the overall] conspiracy of using the 'law as a weapon,' " including hiding the conspiracy "behind a shroud of secrecy by the illicit use of attorney-client privilege. *See e.g.* Compl. at ¶¶ 49-50, 113-141, 148-185, 186-207, 223-293." R3-41:memo.-13. Two of the cited complaint paragraphs, 49 and 50, expressly aver abuse of TPO-arrest. R1-2-26-27. Petitioner also expressly averred Donna Sims

deliberately advised Jeanie Undseth to abuse TPO-arrest process, *e.g.* R1-2-30-34, and that Respondent Donna Sims illegally proceeded with the TPO-arrest and deprivations even after Petitioner was not goaded by their scheme, *e.g.* R1-2-32-37, 58-71, 74-95, 101-123, all of which the district court should have known when enforcing Respondent Donna Sims' dismissal since Petitioner thrice cited the alleged 6-year continuing transaction in the FRCP 60(b) memorandum. R3-41:memo.-4, 11, 14.

It is well-settled that "[l]awyers act under color of state law when there is a malicious violation of an individual's rights through a knowing abuse of the legal process" or prosecution of a "patently unconstitutional proceeding." 14A C.J.S. *Civil Rights* § 382 (2006). Thus, considering the averments of abuse of legal process including TPO-arrest, arguing that Donna Sims was a state actor is proper. And Petitioner's complaint sufficiently averred Barbara Moon abused Petitioner's rights by abuse of legal process. *E.g.* R1-2-15-17, 131-133, 140-151, 155-156, 158, 159-160, 165-166. Thus Petitioner either sufficiently argued or averred that the other private defendants maliciously violated his rights by deliberate abuse of legal process, thus identifying them as state actors. Moreover, it is also well-settled that such averred misconduct places joint liability upon Respondents Jeanie Undseth, Sims and Moon. *Banco*, 876 A.2d at 262-264. And, as per *Kirby*, the lower court was duty-bound to recognize such averments as true, especially as the entire alleged 6-year transaction was thrice cited in Petitioner's FRCP 60(b) motion. *Ergo*, the district court abused its discretion by failing to correct its unlawful dismissal of Respondents Sims and Moon, as well as of Respondent Jeanie Undseth, barring frivolousness, thus again showing the Eleventh Circuit arbitrarily and capriciously dismissed Petitioner's appeal.

Additionally, Judge Evans should personally know that Respondent Barbara Moon can be held liable for § 1983 violations. Petitioner averred that Barbara Moon knowingly and maliciously abused Petitioner's rights with both direct

and inferential averments that such abuse is evidenced by the fact that Barbara Moon either intentionally failed to execute discovery or intentionally hid or otherwise disregarded discovery findings. *E.g.* R1-2-131-133, 141-151; *see* R3-38-14. Judge Evans' own ruling recognizes failure to execute discovery is bad practice. *Cf. House v. Balkcom*, 562 F. Supp. 1111, 1137 (N.D. Ga. 1983) (Evans, J., presiding) (stating: "[the plaintiff's criminal defense attorneys] clearly had a duty to investigate facts reasonably available to them" and their failure to do so "[fell] below the standard required of reasonably effective counsel"). *Ergo*, Judge Evans knows Petitioner's averments of abuse of discovery process sustains claims Respondent Moon violated Petitioner's civil rights by deliberate abuse of legal process. *Ergo*, Judge Evans additionally abused her discretion in affirming that Respondent Barbara Moon could not be joined nor otherwise held liable to § 1983 violations, additionally barring frivolousness, thus again showing the Eleventh Circuit arbitrarily and capriciously dismissed Petitioner's appeal.

But it is the district court's holding regarding Petitioner's averments of § 1985 conspiracy that effectively admits the other private defendants were joinable. The district court stated: "to the extent that [Petitioner] has alleged the violation of any right protected by 42 U.S.C. § 1985, *which the [district] Court finds extremely doubtful*, he must be able to show that such a violation was the result of a conspiracy." R3-38-22 (emphasis added). Thus the district court admitted that it only doubted Petitioner could prove no set of facts in support of his § 1985 claims which would entitle him to relief. As established, doubt is not sufficient to authorize dismissal for failure to state a claim, especially because Petitioner proceeded *pro se*. Pgs. 7, 21 *supra*. Further, against the backdrop of the district court's admission of doubt, the putative lack of "showing" of conspiracy additionally proves the Petitioner's § 1985 claims were sufficiently pled: because Petitioner averred the overall conspiracy of fraud was committed under a shroud of secrecy by illicit use of

attorney-client privilege, thus allegedly keeping the information in exclusive possession of Petitioner's adversaries, pleading law mandates, as established page 21 *supra*, that Petitioner could not be held responsible to aver facts of conspiracy Petitioner candidly averred he had no access to. And this against a backdrop where Petitioner also candidly averred Respondents had used the law as a weapon, thus expressly pleading that the facts of the case were inextricably bound up and seared into the law of the case. Thus it was binding upon the district court to at least await pretrial for Petitioner's presentation of the law of the case and the acquisition of facts supporting Petitioner's § 1985, and other federal, claims. What can be surmised is that Petitioner's averred § 1985 injuries, as implicitly recognized by the district court, however doubtfully pled or proved, shows imposed obligation upon the district court to join Respondents Jeanie Undseth, Donna Sims and Barbara Moon to the case at least until pretrial. Failure to do so was nothing less than abuse of discretion, which the Eleventh Circuit thus arbitrarily and capriciously sanctioned.

Additionally, Petitioner averred the Riverdale Georgia Police Department [RPD] had, at least constructively, participated in the fraud of Petitioner's constitutionally protected rights by deliberately failing to follow statute and procedure which manifestly protects those frivolously accused of perpetrating family violence. R3-41:memo.-10-11. This failure was averred to be the practiced custom of the RPD and the Clayton County judiciary. R3-41:memo.-10-11. This provides legitimate argument for § 1983 claims against participating RPD officers. *See* 14A C.J.S. *Civil Rights* § 386 (§ 1983 liability exists where a "[police] officer employs illegal methods" in violation of arrest statutes). And even Justice Evans' FRCP 60(b) denial cites caselaw recognizing such averments sustain § 1983 claims against the City of Riverdale. *Shelby v. City of Atlanta*, 578 F. Supp. 1368, 1370 (N.D. Ga. 1984) (cited at R3-38-20).

Lastly, the 4 justices involved in the state proceedings, *see*

R3-38-20-21, may be held liable for any § 1983 violations. Absolute immunity applies "only for acts performed in [a judge's] 'judicial' capacity" and does not apply in " 'clear absence of all jurisdiction.' " *Stump v. Sparkman*, 435 U.S. 349, 356-57, 360 (1978). Thus, as TPOs are not judicial proceedings, the 2 TPO justices involved are subject to § 1983 liability. Because the TPO's progeny proceedings lacked cause the other 2 justices can also be held liable for any § 1983 violations. *See State v. Evans*, 187 Ga. App. 649, 371 S.E.2d 432, 433 (1988) ("[a] disqualified judge can take NO judicial action in [a] case." (emphasis added)). Thus Petitioner's appeal is additionally not frivolous, once again showing it was arbitrarily and capriciously dismissed.

VII. Equity Jurisdiction Over Case Existed And Related Reasons The Eleventh Circuit's Frivolity Dismissal Was Additionally Arbitrary And Capricious.

"[U]nder the united procedure contemplated by the Federal Rules [of Civil Procedure], a claimant may pray for all relief, legal or equitable, to which he is entitled as a matter of substantive right." Wright & Miller, *Federal Practice and Procedure* at vol. 5, § 1257, 516-17. Thus, where equity provides jurisdiction the district court may not bar the case, as recognized by *Incline Village*, 976 F. Supp. at 1358-59, page 4 *supra*. *Accord Miller v. French*, 530 U.S. 327, 340 (2000) (a statute shall not be construed "to displace [the] courts' traditional equitable authority absent the 'clearest command' or an 'inescapable inference' to the contrary" (citations omitted)).

Petitioner averred he was barred from obtaining counsel, both appointed, as noted, and, at least inferentially, as a result of Respondents Jeanie Undseth's and Donna Sims' alleged duplicity. *E.g.* R1-2-15-18, 19-20, 22, 26-34, 43-44. This is especially true when considering that Respondent the State of Georgia asserts there is no right to appointed counsel for civil

defendants, *Calhoun v. Maynard*, 196 Ga. App. 219, 395 S.E.2d 645, 646 (1990), and considering that for the deprivation of child custody Petitioner suffered, substantive law recognizes the substantial possibility Petitioner may have been psychologically unable to make effective legal decisions, like obtaining counsel, thus precluding the ability to protect his custody rights: regarding setting aside a verdict for refusing continuance in a contract suit, the Georgia court of appeals held that the "dangerously ill" child of a defendant father was enough to grant continuance both because the father's presence was needed by the child and also because it "was demanded by every instinct of humanity." *Benford v. Shiver*, 13 Ga. App. 135, 78 S.E. 860, 861 (1913). Further, the *Benford* court:

> conced[ed] the defendant to have the natural instincts of paternity, [and therefore] we [the court] cannot concur in the opinion that he was required to be busying himself with perfecting a certificate to explain his absence from court, but rather are of the opinion that he should be excused for the reason that *the absorbing nature of his interest in his child precluded the consideration of any other subject.*

Benford, *id.*, 78 S.E. at 861-862 (emphasis added); in *Miranda* this Court identified that a woman involuntarily confessed to a crime after being pressured by an arresting officer "in order to prevent her children from being taken by relief authorities." *Miranda v. Ariz.*, 384 U.S. 436, 456 (1966). Unquestionably *Miranda* demonstrates the overwhelming power even the threat of loss of custody holds over parents' legal decision-making, especially when considering *Miranda*'s obvious similarities to TPO proceedings where child custody is an issue, as in the instant case (regarding *Miranda*, also noteworthy is the fact that Petitioner averred that the final TPO was largely negotiated without him being represented by counsel or guaranteed shelter. R1-2-29, 58-62; R3-38-8 n. 7; *Miranda*, 384 U.S. at 445-456); and regarding the *temporary* loss of a child

through a dependency proceeding even the Eleventh Circuit admits "[i]t is difficult to imagine a loss more grievous than that of a parent deprived of his or her child." *Davis v. Page*, 640 F.2d 599, 603 (5th Cir. Unit B 1981). Clearly, upon this caselaw, when considering the averred abuses of the Respondents, especially of the private defendants and agents for the State of Georgia, Petitioner can assert a *factual* argument he was in no frame of mind to procure counsel or otherwise protect his legal rights, especially parental/custody rights. Even without going further Petitioner's factual argument mandates his action should have survived at least until pretrial, as noted page 21 *supra*. Moreover, Petitioner's factual argument necessitated trial, and jury trial if prayed for. *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537 (1958) (recognizing the "command" of the 7th Amendment it is to "assign[] the decisions of disputed questions of fact to the jury"). Thus, not only did the district court abuse its discretion in dismissing for failure to state a claim before trial, but, as Petitioner also demanded jury trial, R1-2-1, 12-13, 216, the district court also illegally commandeered the office of the jury, either of which makes the Eleventh Circuit's sanction thereof arbitrary and capricious.

Petitioner argued that, in absence of all other jurisdiction, the district court was obligated to take the case under the equity maxim that Petitioner had a right that was unprotected by remedy. R3-41:memo.-24-25. Petitioner argued that the lower court's original order "transmutes into a 27 page analysis as to why the Plaintiff was wronged but afforded no remedy for his injuries, exposing a defect in the law," R3-41:memo.-24-25, which the equities presented thus far affirm. And, indeed, "it is the very office of . . . equity to supply [i.e., correct] defects in the law." *Ex Parte Boyd*, 105 U.S. 647, 658 (1881).

But even more defects in the law are exposed when recognizing, as established 21 *supra*, legal theories do not have to be developed in detail before the complaint is filed and the parties have opportunity for discovery. Petitioner, as

noted, asserted by motion filed contemporaneously with complaint that the law of the case is complex–a long, tangled body of law that hit the bottom of the slippery slope– requiring over 2500 pages of supporting brief to establish. R1-4:memo.-4-5. If it took *pro se* Petitioner over 2 ½ years to research and write this supporting brief, which it did, *see id.* (time is inferred by P.S.J. page length), then there could have been (1) no way for Petitioner to bring the law of the case to federal court before finalization of the state-court cases at issue and (2) no reasonable opportunity for Petitioner to present his claims in state court, either of which is a defect of law inequitably depriving Petitioner federal remedy. *Accord U.S. v. Balsys*, 524 U.S. 666, 679 (1998) (" 'equity will not aid a forfeiture' "); *Coral Springs St. Syss., Inc. v. City of Sunrise*, 371 F.3d 1320, 1340 (11th Cir. 2004) ("courts of equity are loath to allow loopholes[and] technicalities . . . when those results would violate basic notions of equity and fair play"); *In re Forman Enters., Inc.*, 281 B.R. 600, 609 (W.D. Pa. 2002) ("A court of equity cannot blithely disregard the principles of logic concerning what follows from what any more than a court of law can"). Also, factor number 2 additionally bars application of *Rooker-Feldman*. Pg. 14 *supra*. Moreover, these 2 factors operating together completely bar Petitioner's right to remedy by eliminating Petitioner's access to *any* and *every* forum in which to seek remedy, exposing another defect of law. Additionally, these 2 factors operating together also bar dismissal even absent equity jurisdiction. *Roe v. Wade*, 410 U.S. 113, 125, 152-153 (1973) (Constitutional challenge to abortion statute existed where general repeatable destruction of reproductive privacy evaded judicial review). Moreover, because the lower court refused to hear the law of the case in pretrial, these 2 factors operating together indicate that the lower court effectively required Petitioner to present the fully-developed law of the case at the pleadings stage, which, besides being barred, also exposes another defect of law and is otherwise inequitable. Additionally the lower court, after having effectively

requiring Petitioner to present the fully-developed law of the case at the pleadings stage, effectively denied Petitioner opportunity to do so by finding Petitioner's complaint too long and ordering Petitioner to abide by FRCP 8's notice pleading requirement, R3-38-4, R3-41:memo.-1-5; i.e., the lower court inequitably and preemptively barred even its illegal and improper effective mandate that Petitioner present his fully-developed law of the case at the pleadings stage.

Thus, for these reasons, equity also provided jurisdiction over the instant case. Additionally, Petitioner's FRCP 60(b) motion should have been granted pursuant to, *inter alia*, FRCP 60(b)(5) or (b)(6). F.R. Civ. P. 60(b)(5) (providing that where expected application of the judgment is contrary to equity it shall be corrected); *Bros Inc. v. W.E. Grace Mfg. Co.*, 320 F.2d 594, 608 (5th Cir. 1963) (FRCP 60(b)(6) "mean[s] to make available those grounds which equity has long recognized as a basis of relief"). Thus, the lower court should have taken Petitioner's case under equity, and ruled in favor of his FRCP 60(b) motion. Failure to do either was nothing less than additional abuse of discretion, which, *ergo*, the Eleventh Circuit's frivolousness dismissal again arbitrarily and capriciously sanctioned.

CONCLUSION

For all the foregoing reasons, it is clear that Petitioner was entitled both for his case to be commenced in the court of first instance, and his appeal to commenced in the Eleventh Circuit. Thus, this failure of the federal system was flagrant, with the ultimate failure being the Eleventh Circuit's arbitrary and capricious frivolousness dismissal. Thus, unless this Court exercises its supervisory powers, justice for every IFP and every *pro se* litigant can at any time be summarily or cursorily swept aside by the premature and unjustified use of "at any time" provisions codified at 28 U.S.C. § 1915(e)(2), 11th Circuit Rule 42–4, or similar federal court rules, thus wrongfully barring legitimate access to the federal courts.

The federal appellate and district courts must know every time they summarily or cursorily dismiss a case or appeal for frivolity pursuant to an "at any time" provision, that this Court shall vigilantly watch over and enforce its appropriate use, and reprove any abuse. Moreover, as Petitioner was deprived of fighting for fundamental marriage, parental, procreative, religious exercise, property and bodily integrity rights by legislation which delegated glaring unconstitutional illegal state powers to private citizens to destroy these rights within the most private of spheres—home, body and spirit—the Eleventh Circuit's and NDGa's approval of such destructions by turning a blind eye means that TPO defendants in the Eleventh Circuit shall never be guaranteed any protection of these fundamental rights. Nor shall anyone else. Because while today it could seem palatable that only TPO defendants are being deprived these rights, in the future, left unchecked, the errors and abuses that the NDGa and the Eleventh Circuit committed against the Petitioner, being complicit with Respondents by failure to act, and including, as a result, federal judicial authorization of Respondent the State of Georgia's very creative legislative fraud—which the federal government also allegedly funds and otherwise supports—shall, *inter alia*, without question, as *Skinner v. Oklahoma* demonstrates, inevitably sanction actual forced abortion or forced pregnancy at some future point in time, not just the substantial equivalent of forced abortion committed against Petitioner today.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BIRGER H. UNDSETH
Pro Se Petitioner
4616 Roswell Road N.E.
Apartment K-1
Atlanta GA 30342
(404) 250-4397

JUNE 2007.

APPENDIX

ORDER SOUGHT TO BE REVIEWED
(No Separate Judgment Entered)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 06-15479-BB
Filed Apr. 3 2007

BIRGER H. UNDSETH, Plaintiff-Appellant,
versus
MS. JEANIE LIA UNDSETH,
a.k.a. Jeanie Doe,
a.k.a. Jeanie Dalle Molle,
a.k.a. Jeanie Collins,
a.k.a. Jeanie Smith,
MS. DONNA SIMS, ET AL., Defendants-Appellees.

—

On Appeal from the United States District Court for the
Northern District of Georgia

—

BEFORE: BIRCH, CARNES and MARCUS, Circuit Judges.

BY THE COURT: On its own motion, the Court DISMISSES this appeal AS FRIVOLOUS. See Eleventh Circuit Rule 42-4. Any remaining pending motions are therefore DENIED AS MOOT.

RELEVANT OPINIONS, ORDERS AND CONCLUSIONS OF LAW
[With Their Internal Page Numbers]

ITEM A. **Aug. 28 2006 NDGa Magistrate Order Granting Original Case IFP Status And Directing District Court To Make Pre-Service 28 U.S.C. § 1915(e)(2) Determination**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 1:06-MI-0243
Civil Action No. 1:06-CV-2022-ODE
Filed Aug. 28 2006

BIRGER H. UNDSETH, Plaintiff,

v.

JEANIE LIA UNDSETH, et al., Defendants.

ORDER

Before the Court is Plaintiff's pro se application to proceed in forma pauperis. [Doc. 1, 18]. Upon consideration of Plaintiff's affidavit, the Court finds that he is unable to pay the costs of this action. See 28 U.S.C. § 1915(a) (1964). Plaintiff's motion to proceed in forma pauperis **IS HEREBY GRANTED;** however, service **SHALL NOT ISSUE** at this time.

Pursuant to 28 U.S.C. § 1915(e)(2), a federal court may dismiss a pro se in forma pauperis complaint if the court determines that the allegation of poverty is untrue, or that the action (1) is frivolous or malicious, (2) fails to state a claim on which relief may be granted, or (3) seeks monetary relief against a defendant who *is* immune from such relief. A claim is frivolous "where it lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325, 109 S. Ct. 1827, 1831-32, 104 L.Ed.2d 338 (1989).

[1]

It is difficult to determine from the Complaint, which is 217 pages long, not counting the exhibits and a considerable appendix, whether it has an arguable basis either in fact or in law. Rule 8 of the Federal Rules of Civil Procedure requires that claims contain "a *short and plain* statement of the grounds upon which the court's jurisdiction depends" and "a *short and plain* statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8 (a) (emphasis

added). Further, "[e]ach averment of a pleading shall be simple, concise, and direct." Fed. R. Civ .P. 8 (e). Therefore, unless Plaintiff amends his complaint to comply with Rule 8, the Court cannot easily determine whether it is frivolous or fails to state a claim.

Accordingly, the Clerk is **DIRECTED** to submit this matter to the District Court for a determination on whether to order that the complaint be amended pursuant to Rule 15 of the Federal Rules of Civil Procedure in order to adhere to those Rules, or, alternately, for a determination with respect to frivolity and failure to state a claim under 28 U.S.C. § 1915(e)(2).

It is **SO ORDERED**, this 25th day of August, 2006.

/s/ E. Clayton Scofield
E. Clayton Scofield III
UNITED STATES MAGISTRATE JUDGE

2

ITEM B. Sept. 11 2006 NDGa Clerk's Judgment Dismissing Case Asserting 28 U.S.C. § 1915(e)(2)(B)(ii) Failure To State A Claim

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action File No. 1: 06-cv-2022-0DE

Birger H. Undseth, Plaintiff,
vs.
Ms. Jeanie Lia Undseth, et al [sic], Defendants.

JUDGMENT

This action having come before the court, Honorable Orinda D. Evans, United States District Judge, for a frivolity determination pursuant to 28 U.S.C. §1915(e)(2), and the court having made such determination, it is

Ordered and Adjudged that the action be **DISMISSED** for failure to state a claim upon which relief may be granted.

Dated at Atlanta, Georgia, this 11th day of September, 2006.

JAMES N. HATTEN
CLERK OF COURT

By: s/Frances M. McNulty
Frances M. McNulty, Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
September 11, 2006
James N. Hatten
Clerk of Court

By: s/Frances M. McNulty
Deputy Clerk

ITEM C. Sept. 11 2006 NDGa Order Dismissing Case Asserting 28 U.S.C. § 1915(e)(2)(B)(ii) Failure To State A Claim

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 1:06-CV-2022-ODE
Civil Action 28 U.S.C. § 1331
Filed Sept. 11 2006

BIRGER H. UNDSETH, Plaintiff,
v.
MS. JEANIE LIA UNDSETH,

MS. DONNA SIMS,
MS. BARBARA MOON,
THE STATE OF GEORGIA,
THE UNITED STATES OF AMERICA, Defendants.

ORDER

Plaintiff has filed the instant pro se civil action, along with numerous motions seeking "emergency" or "expedited" relief. [Docs. 2, 4-17.][1] Plaintiff has been granted in forma pauperis status [Doc. 34], and the matter is now before the Court for a 28 U.S.C. § 1915(e)(2) frivolity determination.

1. 28 U.S.C. § 1915(e)(2) Frivolity Review

A federal court "shall dismiss" an in forma pauperis action "at any time if the court determines that" the action is "frivolous" or "fails to state a claim on which relief

[1] **[FOOTNOTE 1]** Because Plaintiff's original pleadings mention his minor child, they have been docketed under seal, pursuant to this Court's Standing Order No. 04-02. The redacted versions of those pleadings, except for Plaintiff's Notice of Manual Filing [Doc. 3], have been docketed as Documents 18-33. Plaintiff also has filed an Emergency Correction to Complaint. [Docs. 36, 37.]

may be granted." 28 U.S.C. § 1915(e)(2). A claim is frivolous when it appears from the face of the complaint that the factual allegations are "clearly baseless" or that the legal theories are "indisputably meritless." Carroll v. Gross, 984 F.2d 392, 393 (11th Cir. 1993). A complaint may be dismissed for failure to state a claim when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Brower v. County of Inyo, 489 U.S. 593, 597 (1989). "[C]onclusory allegations, unwarranted deductions of facts[,]or legal conclusions masquerading as facts will not prevent dismissal" Oxford Asset Mgmt. v. Jaharis, 297 F.3d 1182, 1187-88 (11th Cir.

2002) (reviewing the dismissal of a complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim).

To state a claim for relief under 42 U.S.C. § 1983, a plaintiff must allege that a defendant's act or omission under color of state law deprived him of a right, privilege, or immunity secured by the Constitution or laws of the United States. See Hale v. Tallapoosa County, 50 F.3d 1579, 1582 (11th Cir. 1995). If a plaintiff fails to satisfy these requirements or to provide factual allegations supporting a viable cause of action, the claim is subject to dismissal. See Chappell v. Rich, 340 F.3d 1279, 1283-84 (11th Cir. 2003) (affirming the district court's dismissal of a § 1983

complaint because plaintiffs' factual allegations were insufficient to support the alleged constitutional violation).

Title 42 Section 1985 "provides a vehicle to redress conspiracies to interfere with civil rights." Farese v. Scherer, 342 F.3d 1223, 1230 (11th Cir. 2003). Section 1985(1) prohibits "conspiracies that interfere with the performance of official duties by federal officers." Morast v. Lance, 807 F.2d 926, 929 (11th Cir. 1987). Section 1985(2) prohibits any conspiracy to obstruct justice by intimidating a party, witness, or juror in a proceeding "in any court of the United States," or by "impeding, hindering, obstructing, or defeating, in any manner, the due course of justice" in order to "deny to any citizen the equal protection of the laws." 42 U.S.C. § 1985(2). See Farese, 342 F.3d at 1229 (stating that "Section 1985(2) prohibits conspiracies to intimidate parties or witnesses to federal lawsuits"). "Section 1985(3) provides a cause of action for a conspiracy to deprive 'any person or class of persons of the equal protection of [the] laws,' " and "protects two types of classes: (1) those kinds of classes offered special protection under the equal protection clause, and (2) classes that Congress was trying to protect when it enacted the Ku Klux Klan Act." Id. (internal quotations omitted).

The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. (RFRA), provides that "Government shall not substantially burden a person's exercise of religion," except "in furtherance of a compelling governmental interest" accomplished by "the least restrictive means." 42 U.S.C. § 2000bb-1. RFRA defines "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." 42 U.S.C. § 2000bb-2(1).

II. Plaintiff's allegations

Plaintiff's complaint is 217 pages long, and his prayer for relief contains 202 separate paragraphs, including 199 requests for declaratory relief. [See Doc. 2 at 167-216.] The Magistrate Judge's observation in this regard is well taken- the complaint, due to its length and obscurity, fails to satisfy the General Rules of Pleading set forth in Fed. R. Civ. P. 8. [See Doc. 34.] Therefore, if this action were to proceed further, Plaintiff would be required to amend his complaint. However, as set forth infra, this Court lacks subject matter jurisdiction to consider any of Plaintiff's claims, and the instant complaint will be dismissed in its entirety.

A. Subject matter jurisdiction

In a preamble to the twelve "counts" Plaintiff sets forth in his complaint, he asserts that this Court has subject matter jurisdiction over this action because of the

important federal constitutional protections afforded the rights connected with marriage and procreation. [Doc. 2 at 2-4.] Plaintiff sues the following Defendants: (1) Jeanie Undseth, Plaintiff's former wife and the mother of their son born during their marriage; (2) Donna Sims, Defendant Undseth's "first attorney"; (3) Barbara Moon, Defendant Undseth's "second attorney" 2; (4) the State of Georgia, which allegedly "has committed wrongdoing in this case

through . . . several agents . . . to be named and identified" later, in the event the State consents to be sued in this action[3]; and (5) the United States of America. [Id. 4-12.] Plaintiff asserts that jurisdiction is proper herein pursuant to numerous federal constitutional sections and amendments, various federal statutes, and Fed. R. Civ. P. 57 (Declaratory Judgments). [Id. 13-14.]

B. Plaintiff's marriage to Defendant Undseth in June 2000, the birth of their son in January 2001, and Defendant Undseth's procurement of a Temporary Protective Order (TPO) against Plaintiff in April 2001

The bulk of Plaintiff's complaint is a detailed description of the history of his relationship with Defendant Undseth, beginning with their first meeting on October

[FOOTNOTE 2] Defendants Undseth, Sims, and Moon are collectively hereinafter "the Private Defendants."

[FOOTNOTE 3] Plaintiff contests the constitutionality of various Georgia statutes, "including, but not limited to," the Family Violence Act and the statutes providing for no fault and cruelty divorces. [Doc. 2 at 8-9.]

31, 1998. [Id. 18.] Their son was conceived on May 4, 2000; they were married on or about June 16, 2000, in Chattanooga, Tennessee; and their son was born on January 11, 2001. [Id. 22-23.] By April 8, 2001, however, their relationship had deteriorated due to Defendant Undseth's alleged entry into a conspiracy to engage in "Family Terrorism, Parental Alienation Syndrome, blaming the victim, alternative aggressions, and other physical and non-physical domestic abuse of Plaintiff and Child," designed to destroy Plaintiff's parental, marriage, and property rights.[Id. 26-27.]

On April 8, 2001, the police came to the Undseth home to investigate a family violence complaint, but no arrests were made.[4] [Id. 32-33.] On April 10, 2001, Defendant Undseth obtained, in the Superior Court of Clayton County, a

temporary protective order (TPO) against Plaintiff, pursuant to the provisions of the Family Violence Act, O.C.G.A. § 19-13-1 et seq. (FVA),[5] allegedly by lying about and

[FOOTNOTE 4] In fact, according to Plaintiff, he "has not been arrested for any domestic violence crimes as codified by O.C.G.A. § 19-13-1." [Doc. 2 at 25.]

[FOOTNOTE 5] O.C.G.A. § 19-13-3 provides, in pertinent part, as follows:

(b) Upon the filing of a verified petition in which the petitioner alleges with specific facts that probable cause exists to establish that family violence has occurred in the past and may occur in the future, the court may order such temporary relief ex parte as it deems necessary to protect the petitioner or a minor of the household from violence. . .

embellishing the events described in the TPO application. Defendant Undseth petitioned the court to require Plaintiff to receive psychological counseling, allegedly in violation of Plaintiff's religious freedom as "a born-again 'charismatic' Christian," to whom such counseling "is an abomination and blasphemy."[6] Judge D. Keith Scott "overlooked material facts even within the *ex parte* T.P.O. application, and made a finding of probable cause erroneously and/or negligently, . . . thereby committing a tyranny of formalism and abandoning The Due Process Clause's truth-finding mission" [Id. 33-36.] Plaintiff claims that the FVA is, in effect, "a criminal forfeiture of [his] child and concomitant Parental Rights, marital residence and community marital property," which violates, inter alia, ten separate amendments to the United States Constitution, as well as federal statutes 42 U.S.C. §§ 1983, 1985, and 2000bb-1. [Id. 41; see id. 37-40, 41-58.]

[FOOTNOTE 5 (cont.)] (c) Within ten days of the filing of the petition under this article or as soon as practical thereafter, but in no case later than 30 days after the filing of the petition, a hearing shall be held at which the

petitioner must prove the allegations of the petition by a preponderance of the evidence as in other civil cases. . . . **[FOOTNOTE 6]** O.C.G.A. § 19-13-4(a)(11) allows a Georgia court, in a protective order, to require "the respondent to receive appropriate psychiatric or psychological services."

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On April 27, 2001, Judge Clara E. Bucci of the Superior Court of Clayton County held a TPO hearing, pursuant to O.C.G.A. § 19-13-3(c), at which Plaintiff and Defendant Undseth testified. Plaintiff had no counsel to represent him, although Defendant Sims represented Defendant Undseth.[7] [Id. 58-60.] Plaintiff requested Judge Bucci to order Defendant Undseth to have no contact with any other man while in the company of Plaintiff s son, in order to secure Plaintiff s "***Constitutionally*** protected right to exclude parental and quasi-parental figures from [his] son's life," but Judge Bucci allegedly laughed at his request. [Id. 61-62.] Plaintiff states that the final TPO [id. App. A, Ex. P to Ex. D] was unconstitutional for various reasons, including the burden on his rights to employment, visitation, and housing, and the fact of his "mental incapability" during the TPO hearing and thereafter, "a matter now settled . . . *res judicata*." [Id. 67; see id. 62-69.] Plaintiff claims that, because his marriage was dissolved by virtue of an unconstitutional TPO, "the marital parties are ***still*** married, even as a matter of law." [Id. 69-70.]

[FOOTNOTE 7] As of April 10, 2001, the date of the TPO, Plaintiff had no transportation or housing of his own. [Doc. 2 at 58-59.] In fact, Plaintiff asserts that he "was dependent on Defendant Jeanie Undseth for housing, transportation and financial support before and during the tenure of their marriage." [Id. 29.]

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Although, as noted above, Plaintiff was never arrested on a

family violence charge, he claims that O.C.G.A. §§ 17-4-20.1 and 17-6-1(f)(2), (f)(3) – concerning the investigation and reporting of incidents of family violence, the arrest of a person suspected of an act of family violence, and the setting of bail for such a person – are unconstitutional. He also claims standing to challenge these provisions because he had a reasonable fear of being subjected to their purview. [Id. 71-73.]

C. The divorce mediation in August 2001

Plaintiff claims that Defendant Undseth committed an act of family violence by formatting the hard drive on his computer before returning it to him, thereby destroying valuable information, including pictures of his son.[8] [Id. 74-76.] Defendant Undseth filed for divorce on June 4, 2001. [Id. 78; see id. App. A, Ex. N to Ex. D.] On August 7, 2001, a mediation was conducted by the Alternative Dispute Resolution Office of the Clayton Judicial Circuit, pursuant to Mediation Guidelines that Plaintiff claims were "patently unconstitutional" because of their confidentiality requirement. Plaintiff also claims that the mediation was "a felony and *ergo* an act of

[FOOTNOTE 8] Plaintiff also claims that Defendant Undseth committed "an act of family violence" by fraudulently accepting welfare payments, demonstrating that she "was the domestic violence perpetrator in our share[d] household." [Doc. 2 at 29.]

family violence," and the proceeding was essentially *ex parte* due to his mental incapability. [Id. 78-84; see id. App. A, Ex. J to Ex. D.]

D. Defendant Undseth's August 2001 motion for contempt of the TPO

On August 13, 2001, Defendant Undseth filed in the Superior Court of Clayton County a motion for contempt of the TPO, which Plaintiff contends was "a perjury, false swearing and/or misrepresentation by omission and

commission" regarding, inter alia, his allegedly keeping his son in an "unkempt condition" during visitation. [Id. 84-87; see id. App. A, Ex. L to Ex. D.] The contempt hearing was held before Judge Michael P. Baird on August 31, 2001, at which time Defendant Undseth allegedly falsely accused Plaintiff of leaving his son in diapers "grossly laden with feces, for extended time periods." [Id. 87-88.] Plaintiff claims that Judge Baird, inter alia, "committed tyranny by formalism," maliciously abandoned "The Due Process Clause's truth-finding mission," allowed Defendant Undseth to use the mediation's confidentiality agreement "as both a sword and a shield," and "made findings contrary to [the] evidence," when, in an order dated August 31, 2001, he barred Plaintiff's visitation with his son "until further Order of the Court." [Id. 93-95; see id. Ex. F.]

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E. The divorce proceedings in January and February 2002

Even though, according to Plaintiff, the TPO and the related contempt order expired on October 28, 2001, six months after the TPO was issued, Defendant Undseth refused to cooperate with Plaintiff s subsequent attempts to visit his son until December 5, 2001, the date set for the hearing on their divorce proceedings, and thereafter until January 9, 2002, the date of the re-scheduled hearing. [Id. 96-100.] Plaintiff contends that his divorce, "tried on both no-fault and cruelty grounds," violated various protections afforded to him by law, equity and the United States Constitution. Plaintiff also contends that he was denied his constitutional right to counsel, to which he was entitled due to his mental incapability, and that Defendant Undseth committed perjury during the divorce proceedings, suborned by her attorney, Defendant Sims. [Id. 101-115.]

Judge Deborah C. Benefield, presiding, allegedly "committed tyranny of formalism and abandoned The Due Process Clause's truth- finding mission," violating various of

Plaintiff's rights, by, inter alia, issuing the visitation order and the order for Plaintiff to receive psychological counseling as part of the divorce decree. [Id. 116-21.] Accordingly, "the divorce . . . is void and the marriage is still legally viable and/or in force, marital cohabitation was never legally dissolved, and neither [were]

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Plaintiff's Parental Rights legally terminated." [Id. 122-23.] The divorce decree was finalized on February 20, 2002. [Id. 123; see id. App. B, Ex. A to Ex. H.]

F. Plaintiff's failure to attend a parenting seminar and to pay child support

On April 22, 2002, Judge Benefield issued a Rule Nisi order for Plaintiff to show cause on May 20, 2002, why he had failed to attend a parenting seminar as previously ordered, and Plaintiff was jailed that same day when he informed the court that the prior order was void. Plaintiff was released on bond on May 31, 2002, on a "concurrent child abandonment charge" based on his failure to pay child support. Plaintiff claims that the proceedings regarding the parenting seminar violated his constitutional rights. [Id. 134-37.] On April 30, 2002, Defendant Undseth applied for an arrest warrant against Plaintiff for child abandonment because he had failed to pay $50 per week in child support as required by the divorce decree. After a "pre-issuance hearing" on May 22, 2002, an attorney was appointed to represent Plaintiff in his criminal proceedings. Plaintiff pled guilty on July 9, 2002, and was ordered to pay $50 per week in child support, allegedly in violation of his constitutional rights. [Id. 137-39; see id. App. A, Ex. D to Ex. D.]

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G. Defendant Undseth's February 2003 Petition to Modify Child Visitation

After the divorce became final, Defendant Undseth allegedly continued to harass Plaintiff and to obstruct his

right of visitation with his son, including calling the Riverdale Police Department (RPD) on four occasions, in March and August 2002 and in February and August 2003, "in order to actually or constructively frame [him] with false accusations of abuse." [Id. 123-29.] The RPD "wrongfully assigned the criminal or quasi-criminal stigma of 'primary aggressor' and/or 'primary physical aggressor' " to Plaintiff.[9] [Id. 130; see id. 73.] Plaintiff asserts that discovery will reveal that the RPD reported these erroneous allegations of domestic violence to the state and federal agencies tasked with keeping statistics on such violence. [Id. 130-31.] Plaintiff claims that Defendant Undseth manufactured the February 22, 2003, domestic violence call in order to support her Petition to Modify Child Visitation, which she filed in the Superior Court of Clayton County on February 27, 2003. [Id. 131-32; see id. App. B, Ex. H.]

[FOOTNOTE 9] O.C.G.A. § 17-4-20.1(b) provides, in pertinent part, as follows: "Where complaint s of family violence are received from two or more opposing parties, the [investigating] officer [at the scene] shall evaluate each complaint separately to attempt to determine who was the primary aggressor."

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As a result of the subsequent proceedings regarding the petition to modify visitation, during which Defendants Undseth and Moon allegedly conspired to present perjured testimony and/or to hide material facts from presiding Judge Benefield, Plaintiff's visitation rights were modified by a consent order, resulting in a 28.2% reduction in his annual visitation time with his son. [Id. 157; see id. 140-58.] Although not represented by counsel, Plaintiff filed a lengthy Answer to Petition to Modify Child Visitation, wherein he raised many of the same federal statutory and constitutional claims that he has raised herein. [See id. App. A, Ex. D at 17-30.] Plaintiff alleges that Defendant Undseth has "actually or constructively disobeyed the consent order" by, inter alia,

"living in a state of concubinage or marriage with one Robbie X. Doe" since January 2005, keeping herself a transient, concealing Plaintiff's son from him, and bearing a child to Mr. Doe. [Id. 159-62.]

H. Defendant Undseth's child, Sarah X. Doe

Plaintiff asserts that the birth of this child, Sarah X. Doe, violates his "fundamental right to have all of [his son's] siblings be exclusive issue of the conjugal union between [himself] and Defendant Jeanie Undseth," and also amounts to the imposition upon him of a condition "that is analogous to ***both*** forced pregnancy ***and*** forced abortion," thereby destroying his "fundamental right to bear and beget

children." [Id. 162-63.] Plaintiff claims that Defendant Undseth has moved her residence twice during 2006, providing him only with a cellular telephone number, in violation of his federal statutory and constitutional rights. [Id. 164-66.]

III. Plaintiff's prayer for relief

As noted supra, Plaintiff seeks a 199-part order for declaratory relief, as well as costs and any other relief that the Court deems appropriate. [Id. 167-216.] Defendant asserts his rights have been violated under

> The Constitution of the United States of America and/or federal statute, including but not necessarily limited to any, or any part or clause of any, of the following which apply: The Sundays Excepted Clause at Article 1, Section 7; The Contract Clause at Article 1, Section 10; Article 4, Sections 2 and 4; Privacy; Due Process; Equal Protection of the Laws; other additional applicable provisions and protections of the 1st, 4th, 5th, 7th, 8th, 9th, 10th, 13th, and 14th Amendments of the United States Constitution and related or similar Constitutional Articles; 42 U.S.C. §§ 1983, 1985, 2000bb-1, 10410(d); [and] any other applicable federal statute.

[Doc. 2 at 167-69, 174-76, 180-81, 183-87.] Of greatest

significance, Plaintiff seeks declarations that his divorce is "void and/or unenforceable"; his marriage "is legally still in effect and/or enforceable"; and "any legal decree and/or judgment" that has mitigated or destroyed his Marriage, Parental Rights, or Property Rights in Community Marital Property is "void and/or unenforceable." [Id. 167-69.]

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In addition, Plaintiff seeks very specific declarations that each of the following actions, events, or circumstances, inter alia, violated some or all of his federal constitutional and statutory rights, as set forth supra: (1) the birth of Sarah X. Doe [id. 169-70]; (2) the TPO, the *ex parte* TPO hearing, the no-fault divorce, the cruelty divorce, the divorce mediation, the TPO contempt proceeding, the proceeding on contempt of the order to attend a parenting seminar, the child abandonment proceeding, and the child visitation modification proceeding, as well as Defendant' actions in connection therewith [id. 171-74]; (3) Georgia's Family Violence Act [id. 174-80, 199]; (4) Georgia's no-fault and cruelty divorces [id. 180-85]; (5) Georgia's provisions for investigation, arrest, and bond in connection with alleged acts of family violence [id. 185-87]; (6) the activities of the Georgia Coalition Against Domestic Violence (GCADV) [id. 187]; (7) Defendant Undseth's actions in connection with her divorce from Plaintiff and the related visitation and child support disputes, "with and/or without the aid of accomplices Defendant Donna Sims, Defendant Barbara Moon, and/or other applicable named Defendants" [id. 187-200]; (8) the actions of the RPD in failing properly to assess Defendant Undseth' s domestic violence complaints, or to close, open, and/or document cases arising from those complaints, thereby aiding the Private Defendants "in their schemes and conspiracies" [id. 200-01]; (9) the

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reliance by the governments of the State of Georgia and the

United States on the "falsified figures" of domestic violence reported by the RPD, based on Defendant Undseth's fraudulent allegations against Plaintiff, and the assistance given by the United States to the GCADV "in defrauding the People of the State of Georgia" regarding the GCADV's purported lobbying activities [id. 187, 201-02]; (10) the actions and rulings of Judges Scott, Bucci, Baird, and Benefield in Plaintiff's divorce (11) various other aspects of Plaintiff's divorce and related proceedings as conducted pursuant to Georgia law [id. 207-16].

IV. The named Defendants and others identified in the Complaint

A. The State of Georgia and the United States of America

This Court's jurisdiction is constitutionally limited to a "case or controversy" wherein a plaintiff has standing, i.e., "when the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action." Warth v. Seldin, 422 U.S. 490, 498-99 (1975) (internal quotations omitted).

> It is by now well established that, to satisfy the constitutional requirements of standing, a plaintiff must make three showings: First, the plaintiff must have suffered an injury in fact - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there

> must be a causal connection between the injury and the conduct complained of the injury has to be fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Bochese v. Town of Ponce Inlet, 405 F.3d 964, 980 (11th Cir.) (internal quotations omitted), cert. denied, 126 S. Ct.

377 (2005). Based on Plaintiff s allegations that the State of Georgia and the United States accumulated false domestic violence statistics and that the United States failed to supervise the lobbying activities of the GCADV, Plaintiff has not shown an "injury in fact" that is sufficiently "concrete and particularized" and that is "traceable to the challenged action[s]" of these Defendants. In short, Plaintiff does not have standing in this Court to sue either of these Defendants based on the foregoing allegations.[10] Plaintiff also suggests that the State of Georgia may be amenable to suit based on the actions of its alleged "agents of wrongdoing," such as the Riverdale Police Department. [See, e.g., Doc. 2 at 129.] However, "[t]he Eleventh Amendment insulates a state from suit brought by individuals in federal court unless the state either

[FOOTNOTE 10] Nor, to the extent that Plaintiff seeks declaratory relief against the GCADV, has he alleged facts demonstrating that he has standing to sue that entity. [See Doc. 2 at 187 (seeking declaratory relief regarding the GCADV's lobbying activities, or lack thereof); see also id. 55-58.]

consents to suit or waives its Eleventh Amendment immunity." Stevens v. Gay, 864 F.2d 113, 114-15 (11th Cir. 1989) (footnote omitted) (noting that the Eleventh Amendment bars a 42 U.S.C. § 1983 action against a state and its agencies "regardless of whether the plaintiff seeks money damages or prospective injunctive relief"). Moreover, "[i]t is well settled that sovereign immunity bars suits against the United States except to the extent that it consents to be sued." Means v. United States, 176 F.3d 1376, 1378 (11th Cir. 1999). The Federal Tort Claims Act (FTCA) provides a "limited waiver" of this sovereign immunity. JBP Acquisitions, L.P. v. United States ex rel. FDIC, 224 F.3d 1260, 1263 (11th Cir. 2000). However, a district court may not entertain an FTCA action "unless the claimant shall have

first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing." 28 U.S.C. § 2675(a). Based on the foregoing, the Court finds no basis in the record or the relevant caselaw to allow any of Plaintiff's claims to proceed against either the State of Georgia or the United States of America.

B. The Riverdale Police Department

As noted supra, Plaintiff has suggested that members of the Riverdale Police Department violated his federal rights by responding to Defendant Undseth's domestic disturbance calls. However, Plaintiff admits that no action was taken with respect to

any such call, except that certain unspecified members of the Department may have submitted reports or opened cases based on these incidents. These conclusory allegations are insufficient to support a cause of action against any named or unnamed defendant herein. Moreover, the Riverdale Police Department itself is not amenable to suit in this Court. See Dean v. Barber, 951 F.2d 1210, 1214 (11th Cir. 1992) (upholding the dismissal of § 1983 claims against an Alabama sheriff's department because "[s]heriff's departments and police departments are not usually considered legal entities subject to suit"); Shelby v. City of Atlanta, 578 F. Supp. 1368, 1370 (N.D. Ga. 1984) (holding that a department that is "merely the vehicle through which the [local] government fulfills its policing functions. . . . is not an entity subject to suit"). Legal capacity to be sued is determined according to state law, see Fed. R. Civ. P. 17(b), and the undersigned is not aware of any basis in Georgia law for allowing Plaintiff to sue the Riverdale Police Department, even if Plaintiff had named the Department as a defendant in this action.

C. The judges of the Superior Court of Clayton County

Also as noted supra, Plaintiff seeks declarations that the actions of four judges of the Superior Court of Clayton

County violated his federal rights. However, "in any action brought against judicial officer for an act or omission taken in such officer's

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judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983. The Eleventh Circuit has concluded that the above language allows only declaratory relief against judicial officers, to which a plaintiff is not entitled if "there is an adequate remedy at law." See Bolin v. Story, 225 F.3d 1234, 1242-43 (11th Cir. 2000) (affirming the dismissal of plaintiffs' claims for declaratory or injunctive relief because the plaintiffs had an adequate remedy at law, namely, the right to "appeal any rulings, or actions taken, in their criminal cases" or to "seek an extraordinary writ such as a writ of mandamus"). There is no suggestion in the record that Plaintiff does not have an adequate remedy at law for any alleged violation by the four Clayton County judges. See id. at 1243. Accordingly, even if Plaintiff had named these judges as defendants herein, he would not be entitled to declaratory relief against them.

D. The Private Defendants (Undseth, Sims, and Moon)

"The federal constitution does not protect against injuries by purely private individuals – that is, individuals who cannot be considered as acting for state or local government." Howard v. Wal-Mart, 175 Fed. Appx. 282, 283 (11th Cir. Mar. 15, 2006) (unpublished opinion). Accordingly, to the extent that the Private Defendants acted as "purely private individuals," Plaintiff s constitutional claims may not proceed

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against them. Moreover, "[o]nly in rare circumstances can a private party be viewed as a 'state actor' for section 1983 purposes." Harvey v. Harvey, 949 F.2d 1127, 1130, 1133 (11th Cir. 1992) (noting that a private actor may be liable

under § 1983 if she was "a willful participant in joint action with the State or its agents," but "the plaintiff must plead in detail, through reference to material facts, the relationship or nature of the conspiracy between the state actor(s) and the private persons"). Plaintiff's allegations do not meet the threshold for demonstrating the "rare circumstances" in which otherwise private individuals may be deemed state actors.

Furthermore, to the extent that Plaintiff has alleged the violation of any right protected by 42 U.S.C. § 1985, which the Court finds extremely doubtful, he must be able to show that such a violation was the result of a conspiracy. See Farese, 342 F .3d at 1229-30. However, Plaintiff has alleged only in the most general terms that the Private Defendants, "along with named agents of wrongdoing herein for applicable Defendants, entered into actual or constructive conspiracy and fraud." [Doc. 2 at 15.] Plaintiff has not provided detailed, material facts to support his conclusory allegations of conspiracy, and, therefore, he may not proceed against the Private Defendants under § 1983 or § 1985, or for any alleged constitutional violation. See Fullman v. Graddick, 739 F.2d 553, 557 (11th Cir. 1984) (noting that "[a] complaint may

justifiably be dismissed because of the conclusory, vague and general nature of the allegations of conspiracy").

Moreover, it is apparent that the Private Defendants do not fall within the definition of "government" set forth in RFRA, and, therefore, they are not proper defendants in an action brought pursuant to 42 U.S.C. § 2000bb-1. Finally, with respect to 42 U.S.C. § 10410(d), the only other federal statute pursuant to which Plaintiff asserts a violation of his rights, the Court notes that this statute concerns a very specific limitation on the lobbying activities of "State domestic violence coalitions," and, therefore, it does not support a cause of action against the Private Defendants herein. In sum,

Plaintiff may not proceed against the Private Defendants on the basis of the alleged violation of any federal constitutional or statutory provision set forth in his complaint.

V. The Rooker-Feldman doctrine

Moreover, under the Rooker-Feldman doctrine, this Court lacks jurisdiction over Plaintiff's claims. "The *Rooker-Feldman* doctrine places limits on the subject matter jurisdiction of federal district courts . . . over certain matters related to previous state court litigation." Goodman v. Sipos, 259 F.3d 1327, 1332 (11th Cir. 2001). The doctrine applies to "cases brought by state-court losers complaining of injuries caused

by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005). "The doctrine extends not only to constitutional claims presented or adjudicated by a state court, but also to claims that are 'inextricably intertwined' with a state court judgment," i.e., to any "federal claim [that] succeeds only to the extent that the state court wrongly decided the issues before it." Siegel v. LePore, 234 F.3d 1163, 1172 (11th 2000) (en banc). "However, even if a claim is inextricably intertwined with the state court's judgment, the doctrine does not apply if the plaintiff had no reasonable opportunity to raise his federal claim in state proceedings." Goodman, 259 F.3d at 1332 (internal quotations omitted).

Plaintiff seeks herein declaratory relief that would overturn the outcome of his divorce proceedings in state court and reinstate his marriage to Defendant Undseth, based on alleged violations of his federal statutory and constitutional rights during the course of those proceedings. Accordingly, this "is an easy case for application of the *Rooker-Feldman* doctrine." See id. at 1332-33 (noting the doctrine's application in two prior cases involving "direct attacks on the

previous state court judgment": in Staley v. Ledbetter, 837 F.2d 1016 (11th Cir. 1988), where "the plaintiff in essence

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sought to reverse a state court's child custody determination"; and in Liedel v. Juvenile Court of Madison County, 891 F.2d 1542 (11th Cir. 1990), where the requested relief effectively would have nullified state court orders in a child custody dispute) (internal quotations omitted).

The declaratory relief that Plaintiff seeks herein regarding his divorce and related proceedings would either (1) nullify the orders of the Superior Court of Clayton County in those proceedings, or (2) call into doubt the legal basis for the court's orders. Therefore, Plaintiff's claims either (1) directly attack the state court's orders, or (2) "succeed[] only to the extent that the . . . court wrongly decided the issues before it," and thus are inextricably intertwined with those orders. See Siegel, 234 F.3d at 1172. See also Goodman, 259 F.3d at 1334 (concluding that a claim challenging as false an affidavit that supported a state court's custody ruling was inextricably intertwined with that ruling); Powell v. Powell, 80 F.3d 464, 465, 467 (11th Cir. 1996) (concluding that plaintiff's challenge to the constitutionality of a federal statute that "allow[ed] the application of both community property and equitable distribution principles to military retirement pay" – pursuant to which "the state [divorce] trial court, in accordance with Georgia principles of equitable division," awarded Plaintiff's wife a portion of his retirement pay – was "inextricably

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intertwined with the issue of whether the state court could award [his wife] part of his naval retirement pay," and noting that "[i]f a federal district court were now to hold in [his] favor on his federal claim, that holding would effectively nullify the state court's judgment that [his wife] is to receive a portion of his naval retirement pay") (internal quotations

omitted).

As noted supra, to the extent that Plaintiff s claims do not directly attack the state court orders at issue herein, they are "inextricably intertwined" with those orders and may proceed only if Plaintiff "had no reasonable opportunity to raise" them in state court. See Goodman, 259 F.3d at 1332. The Court finds no basis for concluding that Plaintiff lacked such an opportunity. In fact, as noted supra, Plaintiff raised many of these claims in his response to Defendant Undseth's Petition to Modify Child Visitation. [See Doc. 1 App. A, Ex. D at 17-30.] Moreover, with the exception of the initial, ex parte TPO hearing, and notwithstanding Plaintiff s protestations of mental incapability, Plaintiff was present during all of his divorce and related proceedings. See Goodman, 259 F.3d at 1334 (concluding that plaintiffs had a reasonable opportunity to present their federal constitutional challenges in state court because they "were both parties to the state court proceeding, and with the exception of the initial hearing on [the] ex parte petition to take custody, they were present and

participated in the state court proceedings"); see also Powell, 80 F.3d at 467-68 (noting that plaintiff had a reasonable opportunity to present his federal claim in state court because he could have challenged the constitutionality of the federal statute at issue "as applied to him in the state court proceeding," despite the absence of the federal official against whom such a constitutional challenge normally would be brought, and, if the challenge had been successful, he could have achieved the relief he now sought in federal court).

VI. Conclusion

For the foregoing reasons, this Court finds that Plaintiff has failed to state a claim on which relief may be granted. See 28 U.S.C. § 1915(e)(2[sic](B)(ii). Plaintiff's complaint, as corrected [Docs. 2, 36], is hereby **DISMISSED**. All of

Plaintiff's pending motions [Docs. 4-17] are **DISMISSED AS MOOT**.

IT IS SO ORDERED this /s/ 11 day of /s/ Sept [sic], 2006.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

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ITEM D. Oct. 6 2006 NDGa Order And Opinion Denying Petitioner's Construed Federal Rule Of Civil Procedure 60(b) Motion To Amend 28 U.S.C. § 1915(e)(2)(B)(ii) Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 1:06-CV-2022-ODE
Civil Action 28 U.S.C. § 1331
Filed Oct. 6 2006

BIRGER H. UNDSETH, Plaintiff,
v.
MS. JEANIE LIA UNDSETH et al., Defendants.

ORDER AND OPINION

On September 11, 2006, this Court entered an Order [Doc. 38] and Judgment [Doc. 39] dismissing Plaintiffs civil action, pursuant to 28 U.S.C. § 1915(e)(2), for failure to state a claim. The Court concluded that, pursuant to the Rooker-Feldman doctrine, it lacked subject matter jurisdiction over Plaintiffs claims challenging the outcome of his divorce proceedings in state court. On September 26, 2006, eleven business days after entry of the Judgment, Plaintiff filed the instant Motion to Amend Judgment of Frivolity. [Doc. 41.]

I. Fed. R. Civ. P. 60(b) Standard

A party may seek relief from a judgment pursuant to either Fed. R. Civ. P. 59(e) or Fed. R. Civ. P. 60(b). To fall within the purview of Rule 59(e), a "motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e). Because Plaintiff missed this ten-day deadline, his

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Motion to Amend is governed by Fed. R. Civ. P. 60(b). See Mahone v. Ray, 326 F.3d 1176, 1177 n.1 (11th Cir. 2003) (stating that "[w]hen a motion to alter or amend a judgment under Rule 59(e) . . . is filed more than 10 days after entry of judgment[, it] automatically becomes a Rule 60(b) motion"). Rule 60(b), in pertinent part, provides relief from a final judgment for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . ., misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b). A Rule 60(b) movant "must demonstrate a justification for relief so compelling that the district court [is] *required* to grant [his] motion."[1] Rice v. Ford Motor Co., 88 F.3d 914, 919 (11th Cir. 1996). Moreover, Rule 60(b)(6) provides "an extraordinary remedy which may be invoked only upon a showing of exceptional circumstances." Id. A Rule 60(b) motion is committed to the sound discretion of the district judge. See Am. Bankers Ins. Co. of Florida v. Northwestern Nat'l Ins. Co., 198 F.3d 1332, 1338 (11th Cir. 1999).

[FOOTNOTE 1] A Rule 59(e) movant is held to a similarly stringent requirement and "must demonstrate why the court should reconsider its decision and set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." United States v. Battle, 272 F. Supp. 2d 1354, 1357 (N.D. Ga. 2003) (internal quotations

omitted).

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II. Discussion

In his Motion to Amend, Plaintiff first argues that he should not be required to amend his complaint due to its excessive length, pursuant to Fed. R. Civ. P. 8, because the complaint alleges fraud, which must be pled "with particularity," pursuant to Fed. R. Civ. P. 9(b). [Doc. 41-2 at 1-5.] However, this Court did not dismiss Plaintiff's complaint for excessive length [see Doc. 38 at 4], so that Plaintiff's argument in this regard is inapposite. Next, Plaintiff asserts that the Court (1) prematurely dismissed the State of Georgia and the United States of America as Defendants before they had the opportunity to waive sovereign immunity in order to reap the benefits of participating in this lawsuit [Doc. 41-2 at 5-9]; (2) improperly dismissed the Rockdale Police Department and the four Clayton County judges because, inter alia, they also may be covered by the State's waiver of immunity [id. 10-11]; and (3) improperly dismissed the private defendants because, inter alia, they became state actors when they sought and enforced a Temporary Protective Order against Plaintiff, which is tantamount to participating in the enforcement of the Georgia criminal law and "assum[ing] the role of State prosecutor" [id. 12-19]. The Court finds Plaintiff s arguments in this regard singularly unconvincing and notes that, in any case, Plaintiff could not pursue the

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claims set forth herein even against a defendant who was a proper party to this action, for the reasons set forth in the Court's original Order regarding the application of the Rooker-Feldman doctrine. [See Doc. 38 at 23-27.] Finally, Plaintiff asserts that the Rooker-Feldman doctrine does not bar consideration of his claims because the "bar does not apply to the extent" that he "directly attacks the state court

orders at issue herein." [Doc. 41-2 at 20.] Plaintiff, however, misconstrues the Rooker-Feldman doctrine, which indisputably does bar consideration of claims that directly attack a state court judgment. [See Doc. 38 at 24-25.] Plaintiff next asserts various "theories" whereby he can show that he was denied the opportunity to raise his federal claims in state court. [Doc. 41-2 at 20-24.] These "theories" appear to set forth the following arguments: (1) because his divorce proceedings were equivalent to a criminal prosecution, he is entitled to raise his Fifth and Sixth Amendment claims in federal court, and (2) his "mental incapability" rendered his divorce proceedings ex parte. [Id.] However, as this Court previously noted, Plaintiff not only had the opportunity to present his federal constitutional claims, but did present many of those claims, in state court. [See Doc. 38 at 14,26.] Furthermore, if the instant action is any indication, there is no basis for concluding that Plaintiff was so mentally deficient during his divorce proceedings that he was

incapable of protecting his interests therein. Moreover, Plaintiff has offered no actual evidence establishing his alleged "mental incapability." Therefore, the exception to the Rooker-Feldman doctrine for situations in which "the plaintiff had no reasonable opportunity to raise his federal claim in state proceedings" [see Doc. 38 at 24, 26-27] does not apply here.

III. Conclusion

Plaintiff has not demonstrated "a justification for relief so compelling," under any provision of Rule 60(b), requiring this Court to grant the instant motion. See Rice, 88 F.3d at 919. Accordingly, for the foregoing reasons, Plaintiff's Motion to Amend Judgment of Frivolity [Doc. 41] is **DENIED**.

IT IS SO ORDERED, this /s/ 6 day of /s/ Dec [sic], 2006.

/s/ Orinda D. Evans
ORINDA D. EVANS

UNITED STATES DISTRICT JUDGE
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ITEM E. Nov. 6 2006 Eleventh Circuit Order Allowing Appeal To Proceed In Part For Abuse Of Discretion In Denying Petitioner's Construed Federal Rule Of Civil Procedure 60(b) Motion

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 06-15479-B
Filed Nov. 6 2006

BIRGER H. UNDSETH, Plaintiff-Appellant,
versus
JEANIE LIA UNDSETH,
a.k.a. Jeanie Doe,
a.k.a. Jeanie Dalle Molle,
a.k.a. Jeanie Collins,
a.k.a. Jeanie Smith,
MS. DONNA SIMS,
MS. BARBARA MOON,
THE STATE OF GEORGIA,
THE UNITED STATES OF AMERICA,
Defendants-Appellees.

—

Appeal from the United States District Court for the Northern District of Georgia

—

Before DUBINA and CARNES, Circuit Judges.
BY THE COURT:

This appeal is DISMISSED IN PART and ALLOWED TO PROCEED IN PART. To the extent Appellant's October 12, 2006, notice of appeal challenges the district court's September 11, 2006, order, dismissing the action for frivolity, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), the appeal

[1]

is DISMISSED as untimely. See Fed.R.App.P. 4(a)(l)(A). To the extent Appellant's October 12, 2006, notice of appeal challenges the district court's October 10, 2006, order denying Appellant's construed Fed.R.Civ.P. 60(b) motion for reconsideration, the appeal MAY PROCEED. See Fed.R.App.P. 4(a)(l)(A); Rice v. Ford Motor Co., 88 F.3d 914,918-19 (11th Cir. 1996). The appeal shall be limited to a determination of whether the district court abused its discretion in denying the motion for reconsideration, and it shall not extend to the validity of the underlying judgment per se. Cavaliere v. Allstate Ins. Co., 996 F.2d 1111, 1115 (11th Cir. 1993).

No motion for reconsideration may be filed unless it complies with the timing and other requirements of 11th Cir.R. 40-4 and all other applicable rules.

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ITEM F. Nov. 29 2006 NDGa Order Denying Petitioner's Motion To Proceed On Appeal *In Forma Pauperis*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Civil Action No. 1:06-CV-2022-ODE
Civil Action 28 U.S.C. § 1331
Filed Nov. 29 2006

BIRGER H. UNDSETH, Plaintiff,
v.
MS. JEANIE LIA UNDSETH et al., Defendants.

ORDER

Now before the Court is Plaintiff's application for leave to proceed in forma pauperis on appeal. [Doc. 49.] Previously,

this Court dismissed Plaintiff's civil action pursuant to 28 U.S.C. § 1915(e)(2) for failure to state a claim. [Docs. 38, 39.] The Court concluded that the Rooker-Feldman doctrine deprived it of subject matter jurisdiction over Plaintiff's claims challenging the outcome of his state court divorce proceedings. [Doc. 38.] Plaintiff filed a motion to amend the judgment. [Doc. 43.] This Court denied that motion, which it construed as a Fed. R. Civ. P. 60(b) motion for relief. [Doc. 44.] Plaintiff filed a notice of appeal [Doc. 45], and the Eleventh Circuit has dismissed Plaintiff's appeal as untimely with respect to the underlying Judgment, allowing the appeal to proceed only with respect to the Order denying Plaintiff's construed Rule 60(b) motion. [Doc. 50.]

"An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." 28 U.S.C. § 1915(a)(3). See DeSantis v.

[1]

United Techs. Corp., 15 F. Supp. 2d 1285, 1288-89 (M.D. Fla. 1998) (stating that good faith "must be judged by an objective, not a subjective, standard" and that an appellant "demonstrates good faith when he seeks appellate review of any issue that is not frivolous"). When seeking leave to proceed on appeal in forma pauperis, an appellant must "state[] the issues that [he] intends to present on appeal." Fed. R. App. P.24(a)(1)(C).

Plaintiff intends to show that this Court erred in dismissing his claims under the Rooker-Feldman doctrine, which applies only to judicial proceedings, because the Temporary Protective Order issued by the Superior Court of Clayton County, prior to Plaintiff's divorce, actually constituted "a legislative proceeding," especially in light of the lack of an "*actual* judicial investigation." [Doc. 49-3 ¶¶ 9-10 et seq.; see id. ¶¶ 15-17 (discussing the "underlying criminal subject matter" of Plaintiff's divorce proceedings, which Plaintiff asserts required that counsel be appointed on his behalf, and also discussing the alleged failure of the proceedings to

fulfill the "14th Amendment's Due Process truthfinding mission and purpose").] Plaintiff also intends to show that his former wife, Defendant Jeanie Lia Undseth, was a state actor for purposes of his civil rights complaint, and that the remaining named and unnamed Defendants are amenable to his lawsuit as well. [id. ¶¶ 18-39.]

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This Court has discussed Plaintiff s arguments at length in its two prior Orders [Docs. 38, 44] and has concluded that Plaintiff's claims lack arguable merit. Moreover, because Plaintiff's appeal may proceed only with respect to the denial of his Rule 60(b) motion [see Doc. 50], Plaintiff must identify a non-frivolous issue for the "circumscribed and deferential" appellate review that the Eleventh Circuit will apply to determine whether this Court abused its discretion in denying that motion. Rice v. Ford Motor Co., 88 F.3d 914, 919 (11th Cir. 1996). In short, Plaintiff "must demonstrate a justification for relief so compelling that [this Court] was *required* to grant" his Rule 60(b) motion. Id. Simply put, Plaintiff has not done so. Accordingly, the Court hereby **CERTIFIES,** pursuant to 28 U.S.C. § 1915(a)(3), that Plaintiff's appeal is not taken in good faith. Plaintiff's motion for leave to proceed in forma pauperis on appeal [Doc. 49] is **DENIED.**

IT IS SO ORDERED this /s/ 28 day of /s/ November, 2006.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

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ITEM G. Feb. 7 2007 Eleventh Circuit Order Denying Petitioner's Motion To Proceed On Appeal *In Forma Pauperis*

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 06-15479-B
Filed Feb. 7 2007

BIRGER H. UNDSETH, Plaintiff-Appellant,
versus
MS. JEANIE LIA UNDSETH,
a.k.a. Jeanie Doe,
a.k.a. Jeanie Dalle Molle,
a.k.a. Jeanie Collins,
a.k.a. Jeanie Smith,
MS. DONNA SIMS, ET AL., Defendants-Appellees.

—

Appeal from the United States District Court for the
Northern District of Georgia

—

ORDER:

Appellant's motion for leave to proceed on appeal in forma pauperis is DENIED because the appeal is frivolous. See Pace v. Evans, 709 F.2d 1428 (11th Cir. 1983).

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

ITEM H. May 16 2007 Eleventh Circuit Order Denying Petitioner's Motion For Reconsideration Of Dismissal Of Appeal

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 06-15479-BB
Filed May 16 2007

BIRGER H. UNDSETH, Plaintiff-Appellant,
versus
MS. JEANIE LIA UNDSETH,
a.k.a. Jeanie Doe,
a.k.a. Jeanie Dalle Molle,

a.k.a. Jeanie Collins,
a.k.a. Jeanie Smith,
MS. DONNA SIMS, ET AL., Defendants-Appellees.

—

On Appeal from the United States District Court for the Northern District of Georgia

—

BEFORE: BIRCH, CARNES and MARCUS, Circuit Judges.
BY THE COURT:

Appellant's motion for reconsideration of this Court's April 3, 2007, Order dismissing this appeal as frivolous is DENIED.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I. 42 U.S.C. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

II. 42 U.S.C. 1985:

(1) Preventing officer from performing duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities

under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

III. FEDERAL RULE OF CIVIL PROCEDURE 60(b)

(b) On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more

than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

IV. O.C.G.A. § 19-13-1:

"Family violence" defined

As used in this article, the term "family violence" means the occurrence of one or more of the following acts between past or present spouses, persons who are parents of the same child, parents and children, stepparents and stepchildren, foster parents and foster children, or other persons living or formerly living in the same household:

(1) Any felony; or

(2) Commission of offenses of battery, simple battery, simple assault, assault, stalking, criminal damage to property, unlawful restraint, or criminal trespass.

The term "family violence" shall not be deemed to include reasonable discipline administered by a parent to a child in the form of corporal punishment, restraint, or detention.

V. O.C.G.A. § 19-13-3:

Filing of petition seeking relief from family violence; granting of temporary relief ex parte; hearing; dismissal of petition upon failure to hold hearing; procedural advice for victims

(a) A person who is not a minor may seek relief under

this article by filing a petition with the superior court alleging one or more acts of family violence. A person who is not a minor may also seek relief on behalf of a minor by filing such a petition.

(b) Upon the filing of a verified petition in which the petitioner alleges with specific facts that probable cause exists to establish that family violence has occurred in the past and may occur in the future, the court may order such temporary relief ex parte as it deems necessary to protect the petitioner or a minor of the household from violence. If the court issues an ex parte order, a copy of the order shall be immediately furnished to the petitioner.

(c) Within ten days of the filing of the petition under this article or as soon as practical thereafter, but in no case later than 30 days after the filing of the petition, a hearing shall be held at which the petitioner must prove the allegations of the petition by a preponderance of the evidence as in other civil cases. In the event a hearing cannot be scheduled within the county where the case is pending within the 30 day period the same shall be scheduled and heard within any other county of that circuit. If a hearing is not held within 30 days, the petition shall stand dismissed unless the parties otherwise agree.

(d) Family violence shelter or social service agency staff members designated by the court may explain to all victims not represented by counsel the procedures for filling out and filing all forms and pleadings necessary for the presentation of their petition to the court. The clerk of the court may provide forms for petitions and pleadings to victims of family violence and to any other person designated by the superior court pursuant to this Code section as authorized to advise victims on filling out and filing such petitions and pleadings. The clerk shall not be required to provide assistance to persons in completing such forms or in presenting their case to the court. Any assistance provided pursuant to this Code section shall be performed without cost to the petitioners. The performance of such assistance shall not constitute the

practice of law as defined in Code Section 15-19-51.

VI. O.C.G.A. § 19-13-4:

Protective orders and consent agreements; contents; issuing copy of order to sheriff; expiration; enforcement

(a) The court may, upon the filing of a verified petition, grant any protective order or approve any consent agreement to bring about a cessation of acts of family violence. The court shall not have the authority to issue or approve mutual protective orders concerning paragraph (1), (2), (5), (9), or (11) of this subsection, or any combination thereof, unless the respondent has filed a verified petition as a counter petition pursuant to Code Section 19-13-3 no later than three days, not including Saturdays, Sundays, and legal holidays, prior to the hearing and the provisions of Code Section 19-13-3 have been satisfied. The orders or agreements may:

(1) Direct the respondent to refrain from such acts;

(2) Grant to a party possession of the residence or household of the parties and exclude the other party from the residence or household;

(3) Require a party to provide suitable alternate housing for a spouse, former spouse, or parent and the parties' child or children;

(4) Award temporary custody of minor children and establish temporary visitation rights;

(5) Order the eviction of a party from the residence or household and order assistance to the victim in returning to it, or order assistance in retrieving personal property of the victim if the respondent's eviction has not been ordered;

(6) Order either party to make payments for the support of a minor child as required by law;

(7) Order either party to make payments for the support of a spouse as required by law;

(8) Provide for possession of personal property of the parties;

(9) Order the respondent to refrain from harassing or interfering with the victim;

(10) Award costs and attorney's fees to either party; and

(11) Order the respondent to receive appropriate psychiatric or psychological services as a further measure to prevent the recurrence of family violence.

(b) A copy of the order shall be issued by the clerk of the superior court to the sheriff of the county wherein the order was entered and shall be retained by the sheriff as long as that order shall remain in effect.

(c) Any order granted under this Code section shall remain in effect for up to one year; provided, however, that upon the motion of a petitioner and notice to the respondent and after a hearing, the court in its discretion may convert a temporary order granted under this Code section to an order effective for not more than three years or to a permanent order.

(d) A protective order issued pursuant to this Code section shall apply and shall be effective throughout this state. It shall be the duty of every superior court and of every sheriff, every deputy sheriff, and every state, county, or municipal law enforcement officer within this state to enforce and carry out the terms of any valid protective order issued by any court under the provisions of this Code section.

FILED
OCT 2 2 2007
OFFICE OF THE CLERK
SUPREME COURT

Docket No. 06-1678

In The Supreme Court of The United States

MR. BIRGER H. UNDSETH,
Petitioner,

v.

MS. JEANIE LIA UNDSETH,
[a.k.a. Jeanie Doe, Jeanie Dalle Molle,
Jeanie Collins, Jeanie Smith,]
MS. DONNA SIMS,
MS. BARBARA MOON,
THE STATE OF GEORGIA,
THE UNITED STATES OF AMERICA,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR REHEARING

BIRGER H. UNDSETH
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STATEMENT OF GROUNDS

Petitioner's Petition for a Writ of Certiorari was denied on October 1, 2007. Petitioner submits this Petition for Rehearing on the grounds that there exists an intervening and substantial controlling effect, and substantial grounds not previously presented.

ARGUMENT

A.

Petitioner argued equity provided jurisdiction for his federal case. However, Petitioner in no way argued any relationship of equity to underlying state court proceedings involved in the case. (Pet. Cert. 26-30.) The relationship of equity to the state court proceedings, never previously presented, provides substantial grounds for rehearing. Other reasons also provide grounds for rehearing.

A concise summary of the writ petition, wherein Petitioner called upon this Court to exercise its supervisory power over the Eleventh Circuit pursuant to this Court's Rule 10(a), lays the foundation for Petitioner's grounds for rehearing.

In summary, Petitioner's writ petition showed the Eleventh Circuit sanctioned an extreme departure from the accepted and usual course of judicial proceedings by the Northern District of Georgia, Atlanta Division [hereinafter NDGa], thus validly calling for an exercise of this Court's supervisory power pursuant to Rule 10(a). Petitioner showed the Eleventh Circuit arbitrarily and capriciously denied Petitioner's right to appeal the denial of his Federal Rule of Civil Procedure [hereinafter FRCP] 60(b) motion to amend 28 U.S.C. § 1915(e)(2)

dismissal of a justiciable case he filed in the NDGa, by use of 11th Circuit Rule 42–4's "at any time" provision, similar to § 1915(e)(2)'s "at any time" provision, upon which the NDGa relied. The Eleventh Circuit's dismissal sanctioned the NDGa's wrongful dismissal, unconstitutionally destroying Petitioner's right to proceed with a valid, legitimate claim in the federal courts, which, in turn, sanctioned invidious unconstitutional destructions to, *inter alia*, marriage, parental rights, procreation, religious exercise, property and bodily integrity, not the least of which was an injury which, as recognized by substantive law, is the substantial equivalent of forced abortion, these injuries resulting from his ex-wife's alleged illicit use of a family violence Temporary Protective Order [TPO] as marital separation. (Pet. Cert. 1-30.) Furthermore, substantive law shows the TPO is both an arrest and a detention whose grievous deprivation of liberty entitled Petitioner to appointed counsel which he was never offered (Pet. Cert. 8-9, 14-17), and it is furthermore not a judicial proceeding (Pet. Cert. 10-14, 17), and it is furthermore a prejudgment attachment (Pet. Cert. 17-20), which, as recognized by substantive law, bars application of the *Rooker-Feldman* doctrine and makes Respondent Jeanie Undseth and others state actors (Pet. Cert. 17-26), thus making Petitioner's NDGa case justiciable. Thus the NDGa's denial of Petitioner's FRCP 60(b) motion was abuse of discretion. (Pet. Cert. 2-26.) Thus the Eleventh Circuit's dismissal of Petitioner's appeal was arbitrary and capricious. (Pet. Cert. 2-8, 8-26.)

Of particular note, Petitioner showed the TPO-marital-separation's constitutional defects

precluded jurisdiction to try the TPO's progeny proceedings–especially a combination no-fault/cruelty divorce with concomitant child custody and child support actions–because Georgian divorce requires a *bona fide* marital separation, and, as recognized by substantive law, unconstitutional marital separations cannot be *bona fide*. (Pet. Cert. 8-10.)

B.

I. Divorce *a vinculo matrimonii* is equitable in nature and "presents questions of purely equitable cognizance." 27A C.J.S. *Divorce* § 9 (2005); *accord Dunson v. Dunson*, 311 S.2d 189, 190 (Fla. 1st Dist. App. 1975).

Georgia law is clear "[p]roceedings for a divorce and for alimony have always, under the practice in this State, been regarded as equitable." *Moss v. Moss*, 196 Ga. 340, 26 S.E.2d 628, 632 (1943). In fact, "the superior court judge presiding over a divorce case exercises all of the traditional powers of chancellor in equity, except as otherwise provided by law." *Wilson v. Wilson*, 277 Ga. 801, 596 S.E.2d 392, 395 (2004) (quotations omitted). As Petitioner showed, in Georgia the power for a judge to award permanent or temporary child custody, or child support, is incident to the divorce proceeding, and child support is part of alimony. (Pet. Cert. 8.) Thus there is no question that the final awards of child custody and child support in the Undseth divorce are also of purely equitable cognizance.

Petitioner showed the TPO evicted Petitioner from the family residence, and awarded Respondent Jeanie Undseth sole right to the family residence, as well as child custody and child support. [R1-2-60-

61, 62 & App. A, subex. P]; *see* O.C.G.A. § 19-13-4(a)(2), (4), (6). "Alimony is an allowance out of one party's estate, made for the support of the other party when living separately. It is either temporary or permanent." O.C.G.A. § 19-6-1(a). " 'The object of alimony is the support of the children as well as the wife.' " *Eskew v. Eskew*, 199 Ga. 513, 34 S.E.2d 697, 698 (1945); (*accord* Pet. Cert. 8). Thus the TPO's marital separation, child custody and child support awards made the TPO a species of alimony. Thus the TPO was also an equity proceeding.

II. The judge was the sole trier of fact in the TPO and divorce, including their concomitant child custody and child support actions. [*See e.g.* R1-2-58, 61-62, 65, 69, 101, 115-121 & App. A, subex. P, App. B, subex. A]; (*see* Pet. Cert. 14-17, 25-26). In child custody cases Georgia law mandates that it is the *sole* discretion of the judge, "not the jury," to dispense with the issue of child custody, including all issues of fact. *Weaver v. Weaver*, 238 Ga. 101, 230 S.E.2d 886, 888 (1976); *Alf v. Alf*, 226 Ga. 880, 178 S.E.2d 187, 188 (1970); *Johnson v. Johnson*, 131 Ga. 606, 62 S.E. 1044, 1045 (1908); O.C.G.A. § 19-9-1(a)(1) (2004).

III. In traditional equity proceedings, especially those on or about 1776, well-settled equity process had long barred presiding judges–the chancellor in equity referred to in *Wilson v. Wilson*, *supra*–from arbitrating both matters of law and fact in the same case and, moreover, barred presiding judges from trying any facts of a case whatsoever. The trier of fact remained separate and distinct from the presiding judge from well before 1776 and the

presiding judge was never given power to either identify or sift through and weigh a witness's testimony. Robert Hinde, *The Modern Practice of the High Court of Chancery, Methodized and Digested in a Manner Wholly New* 313-16 (Dublin ed., 1786). The examination of witnesses was done by examiners at the Examiner's office, or by a commission. *Id.* at 316. Examiners or commissions were responsible for the original examination of witnesses, the cross examination of witnesses, "[t]he examination of witneffes [sic] *in perpetuam rei memoriam*," "[t]he examination of witneffes [sic] *de bene effe*," and "[t]he examination of witneffes [sic] *to the credit* of a witnefs [sic] already examined." *Id.* Thus the judge never examined the truth of witnesses' statements while presiding over an equity case's matters of law. In fact, a former practice discontinued well before 1776 called for the Lord Chancellor or Lord Keeper to examine witnesses after the publication of a cause (i.e., case) in equity was passed "or where at the hearing the court entertained doubts," and afterwards the witnesses' sealed depositions were delivered to the Lord Chancellor or Lord Keeper not to be published, except by special order. *Id.* (Publication was the part of equity process that brought all the facts to all the parties through the publication of witness depositions in order to effectuate that the cause was "ripe and proper to be [s]et down for hearing." *Id.* at 378, 403). This "antiquated [s]pecies of examination" was "con[s]idered as ob[s]olete, and con[s]equently out of u[s]e" by the 17th century, *id.* at 316, *ergo* at least 76 years before the *Declaration of Independence* was ratified on July 4th, 1776. Thus well-settled equity process on and about 1776

barred presiding judges from identifying, weighing, or trying witness' testimony.

Equity courts recognized that the "object" of the "work" of the examination of witnesses was to create a "compilation of practical knowledge" of the case, "with a view to elucidate the cour[s]e of the court as at pre[s]ent under[s]tood." *Id.* In other words, the examination of witnesses was effectively understood to be the sum total of the evidence of the case. This shows the facts of an equity case were brought into the equity hearing certified and pre-established, with the truth of these facts judged and substantiated *before* the hearing, and out of the presiding judge's reach in identifying, trying or weighing them. The presiding judge encountered the facts of the case only after they were pulled from contention. And, as noted, this procedure was well-settled well before the *Declaration of Independence* was ratified.

"Anciently" by 1776 the examination of witnesses used to be "before a judge of the court, who[s]e province it was to di[s]criminate between a plain con[s]i[s]tent narrative of facts" or a "[s]u[s]picious, unconnected, de[s]ultory tale." *Id.* at 314. But in chancery this examination of witnesses was originally conducted by the Master of the Rolls. *Id.* And over time the examination of witnesses was left to the Master's clerks, and through interrogatories the Master's clerks "[s]ub[s]tantiat[ed] the allegations on each [s]ide" through the examination of *all* the witnesses. Eventually the examination of all the witnesses which substantiated the allegations on each side found its way into the office of the examiners or commissioners. *Id. In 1776 the role of all this examination was to "prove the facts*

alleged by the pleadings on each [s]ide" "according to the manner of the civil law." Id. at 313-14 (emphasis added). *Ergo*, once again, it is clear that the sum total of the facts of the case consisted of the examination of witnesses, as it was the examination of witnesses that was used to prove the facts of the case. Thus it is clear that from antiquity well-settled equity process barred presiding judges from trying matters of fact in an equity proceeding.

IV. The 14th Amendment requires due process in state court proceedings. The "requirement . . . is met if the [state court] trial is had according to the settled course of judicial proceedings." *Maxwell v. Dow*, 176 U.S. 581, 595 (1900). *Ergo*, state court judicial proceedings not conducted according to a settled course violate due process.

Where state law regulating judicial proceedings conflicts with 14th Amendment due process such law "is in conflict with the supreme law of the land." *Id.* And this Court, "even in the area of domestic relations, has not hesitated to protect, under the supremacy clause, rights and expectancies established by federal law against the operation of state law." Richard P. Shafer, *Federal Pre-Emption of State Authority over Domestic Relations-Federal Cases*, 70 L. Ed. 2d 895, 898 (1981).

V. Because presiding judges arbitrated both fact and law in the instant TPO, divorce, and their concomitant child custody and child support actions, due process was violated:

> One test which has been applied to determine whether due process of law has been

> accorded in given instances is to ascertain what were the settled usages and modes of proceeding under the common and statute law of England before the Declaration of Independence, subject, however, to the qualification that they be shown not to have been unsuited to the civil and political conditions of our ancestors by having been followed in this country after it became a nation.

Powell v. Ala., 287 U.S. 45, 65 (1932) (citations omitted).

Because well-settled English equity process from antiquity barred the presiding judge from arbitrating both matters of fact and law, pp. 4-7 *supra*, *Powell* shows the proceedings in question were not conducted according to a settled course.

Moreover, reiterating, the TPO's deprivation of physical liberty entitled Petitioner to appointed counsel which Petitioner was never offered. (Pet. Cert. 14-17.) Thus counsel needed to be present at every critical stage of the TPO proceeding–e.g., the non-*ex-parte* hearing–which right Petitioner could not waive by lack of affirmative request. *See Mich. v. Jackson*, 475 U.S. 625, 633 & n. 6 (1986). Further, waiver of the right to a separate trier of fact in the TPO (or any of its equitable progeny) required "express and intelligent consent." *See Patton v. U.S.*, 281 U.S. 276, 312-13 (1930) (regarding jury trial). However, the law presumes there is no express and intelligent consent where right to counsel is denied. *See Powell*, 287 U.S. at 68-69. Thus Petitioner did not waive the right to a separate trier of fact in the TPO. (*Accord* Pet. Cert. 14-17.) Thus the proceeding's course remains

unsettled.

Moreover, because the purpose of separating the arbitration of fact and law preserved the truth-finding process, *see* pp. 6-7 *supra*, barring presiding equity judges from arbitrating both fact and law is not unsuited to the civil and political conditions of our ancestors. *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983) (" 'It is precisely the function of a judicial proceeding to determine where the truth lies.' "); *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976) ("[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases . . . ."); *cf. Powell*, 287 U.S. at 68-69 (denial of right to counsel obfuscates the truth-finding process ultimately resulting in "a denial of the hearing").

Thus the TPO-marital-separation violated due process, as did the divorce, as did their child custody and child support (i.e., alimony) orders. Thus Petitioner shows previously unpresented grounds authorizing rehearing.

Additionally, this due process violation again bars the TPO from being a *bona fide* marital separation, thus again precluding jurisdiction for any of its progeny. Pp. 2-3 *supra*.

C.

While the review on a writ of certiorari is discretionary, and broad, S. Ct. R. 10(a), it is not absolute. When deciding to exercise certiorari jurisdiction it is "the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion." Where the issues involved are "[s]pecial and important," and "especially . . . where the issues involved reach constitutional dimensions,"

they indicate the point where avoidance becomes evasion. *Rice v. Sioux City Cemetery, Inc.*, 349 U.S. 70, 73-74 (1955) (quotations omitted).

Rule 10 exists to lighten the Court's workload. *See id.* (commenting on the Judiciary Act of 1925 and creation of the federal appeals courts). However, the Court has recognized that "there are constitutional limits upon the powers of the courts, *even in aid of their own valid processes*, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958) (regarding FRCP 37) (emphasis added).

Thus *Rice* shows the Court is able to breach its discretion, while *Societe* proves a principle of right and justice the Court can easily apply to itself, namely that if the Court breaches its discretion when denying a petition for a writ of certiorari, Rule 10 cannot sustain the denial. Instead the petitioner should be afforded the opportunity to present his or her cause to the Court on the merits.

Petitioner's Petition for a Writ of Certiorari fulfills *Rice*'s requirements. Petitioner shows at least two special and important issues that reach constitutional breadth: (1) the lower courts sanctioned unconstitutional unilateral spousal destruction to, *inter alia*, Petitioner's constitutionally protected fundamental right to raise his child, an injury recognized to be the substantial equivalent of forced abortion (Pet. Cert. 8-10, 10-26); (2) Petitioner's injuries were accomplished by an arrest and detention whose deprivation of physical liberty necessitated appointed counsel in the state courts, in a proceeding that was decidedly *not* judicial, thus

barring application of *Rooker-Feldman*, thus mandating the NDGa to try the case, thus barring the 11th Circuit's "at any time" dismissal (Pet. Cert. 2-8, 10-26); *see also Dunaway v. N.Y.*, 442 U.S. 200, 213 (1979) (" 'strong reason to suspect' " not sufficient to establish probable cause for arrest warrant).

Petitioner was very clear that, pursuant to Rule 10(a), he petitioned the Court to exercise its "supervisory power" over the lower courts in order to "protect the integrity of the federal system." (*E.g.* Pet. Cert. 2-8, 30-31 (quotations omitted)). "Supervise" means "to oversee or direct work." *Webster's New Twentieth Century Dictionary Unabridged* 1831 (2d ed., Simon & Schuster 1983). Thus Rule 10(a)'s phrase "supervisory power" requires the Court to oversee and direct the work of the lower courts. *See Perrin v. U.S.*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." (citation omitted)). Thus Rule 10(a) largely obviates the Court's duty to avoid constitutional decisions where the Court is required to supervise the lower federal courts. Indeed, how can the Court oversee and direct the work of the lower courts if the Court ignores the unconstitutionality of their acts? In the instant case the Court had a duty to oversee the abuses of the lower courts, which it clearly evaded by denying Petitioner's Petition for a Writ of Certiorari. Thus the Court breached its discretion and ruled outside its range of choice, thereby creating an intervening substantial controlling effect authorizing rehearing.

The Court's breach of discretion is no small matter. The 11th Circuit sanctioned the bar of a perfectly legitimate, justiciable case by the NDGa. If in the instant case this Court continues to evade its duty to oversee the courts below, this Court will have done nothing other than sanction the 11th Circuit's and NDGa's precedent of dismissing legitimate federal cases. As this Court knows: "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship." *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). In light of *Chambers*, can this Court really afford to continue to sanction a precedent that unlawfully bars rightful access to the federal courts? Or is it true that in America justice is dead?

CONCLUSION

The Petition for Rehearing should be granted.

Respectfully submitted,

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November 2007.

(Rule 44(2) Certificate follows on next page)

RULE 44(2) CERTIFICATION

Pursuant to Supreme Court Rule 44(2), Petitioner hereby certifies:

(1) that this Petition for Rehearing is restricted to the grounds specified in Rule 44(2), and

(2) that this Petition for Rehearing is submitted in good faith and not for the purpose of delay.

_____

Birger H. Undseth
Pro Se *Petitioner*